SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 782.

THE UNITED STATES, APPELLANT,

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY AND GREAT NORTHERN RAILWAY COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Names and Addresses of Attorneys of Record.

BURTON K. WHEELER, Esq., United States Attorney Butte, Montana.

MESSRS. VEAZEY & VEAZEY, Great Falls, Montana.

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF MONTANA.

UNITED STATES OF AMERICA,
Complainant,

vs.

ST. PAUL, MINNEAPOLIS and MANITOBA RAILWAY COMPANY, a Corporation, and GREAT NORTHERN RAILWAY COMPANY, a Corporation,
Defendants.

Amended Bill of Complaint.

TO THE JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA:

The United States of America, by the Attorney General, and Burton K. Wheeler, United States Attorney for the district of Montana, files this its amended bill of complaint (leave of court having first been obtained) against the St. Paul, Minneapolis and Manitoba Railway Company, a corporation, created under the laws of the State of Minnesota, and the Great Northern Railway Company, a corporation, created under the laws of the State of Minnesota, and thereupon complains and shows to your Honor:

First.

That the defendant, St. Paul, Minneapolis and Manitoba Railway Company is now, and at all the times herein mentioned, was a corporation organized and existing under and by virtue of the laws of the state of Minnesota, and at all the times herein mentioned was, and is, engaged in the business of a common carrier of freight and passengers in the state and district of Montana.

Second.

That the defendant, Great Northern Railway Company, is now, and at all the times herein mentioned, was a corporation organized and existing under and by virtue of the laws of the State of Minnesota, and at all the times herein mentioned was and is engaged in the business of a common carrier of freight and passenegers in the state and district of Montana.

Third.

That at all the dates and times herein mentioned, and prior to the 17th day of June, 1907, your orator was the owner in fee simple of those certain lands situated in the state and district of Montana, and within the Flathead land district, of which the land office is at Kalispell (formerly within the Missoula land district), situated in the county of Lincoln, and more particularly described as follows, to wit: Lots one (1), two (2), three (3), four (4), five (5), six (6) and seven (7), and the southeast quarter of the northwest quarter (S E ¼ of N W ¼) of section thirteen (13), township thirty-one (31) north, range thirty-three (33) west of the Montana principal meridian.

Fourth.

That on or about the 31st day of March, A. D. 1906, said defendant, St. Paul, Minneapolis and Manitoba Railway Company, filed in the United States land office at Kalispell, in said Flathead land district, in the said state and district of Montana, a certain list of lands, describing among others, the lands hereinbefore described; that attached to and a part of said list was an affidavit made and executed by one Thos. R. Benton, the duly authorized agent of the said defendant, St. Paul, Minneapolis and Manitoba Railway Company, and which said affidavit was duly acknowledged before a notary public residing in the county of Ramsey, state of Minnesota, in which said affidavit it was alleged, claimed and asserted, among other things, that said list of lands and said lands were selected by the said defendant, St. Paul, Minneapolis and Manitoba Railway Company, and that said lands were a portion of the public lands claimed by it as inuring to it under the Act of Congress entitled "An act for the relief of settlers upon certain lands in the states of North Dakota and South Dakota," which said Act of Congress was approved August 5, 1892; that said lands at the time of the filing of said list were then and there vacant and unappropriated and were not interdicted nor reserved lands, and were of the character contemplated by said Act. That at the time of the filing of said list and affidavit, said defendant, St. Paul, Minneapolis and Manitoba Railway Company, paid to the Register and Receiver of the said United States land office, at Kalispell aforesaid,

the sum of four dollars as an assessment of the fees payable to the said Register and Receiver, and then and there obtained from said Register and Receiver a certificate and receipt approving said list and certifying, among other things, that said list was found to be accurate by a search of the records, plats and files of said United States land office at Kalispell aforesaid, and also certifying that said lands were not classified and returned as mineral lands or land, and were not claimed as swamp lands, and that there was no homestead, preemption, state or other valid claim to any portion of said lands on file or of record in said United States land office. That in order to obtain patent to said lands hereinbefore described, under said Act of Congress hereinbefore referred to governing the acquisition of the title thereto, it became and was necessary for the said defendant, St. Paul, Minneapolis and Manitoba Railway Company, to file said list and affidavit and secure from said Register and Receiver of said United States land office said certificate, approval and receipt hereinbefore mentioned, and it was also incumbent upon said defendant, St. Paul, Minneapolis and Manitoba Railway Company, to prove to the satisfaction of the Register and Receiver, and to the officers of complainant's General Land Office, whose duty it was to decide whether a patent thereon might lawfully be issued, by satisfactory testimony and evidence that the said lands were of the character contemplated by said Act of Congress hereinbefore referred to. That said above described lands, when so selected, were lands of the complain-

ant belonging to its public domain, were and are mineral lands of great value, to wit, of the value of ten thousand dollars and upwards, and were not subject to selection by said defendant, St. Paul, Minneapolis and Manitoba Railway Company, as inuring to it under the said Act of Congress, but were subject to entry only under the provisions of Chapter 6, Title XXXII of the Revised Statutes of the United States; all of which the said defendant St. Paul, Minneapolis and Manitoba Railway Company, by its officers, attorneys, agents and servants, at the time of the filing of said list and at all times subsequent, well knew.

That thereafter such proceedings were had that on the 24th day of June, A. D. 1907, a patent was issued by the United States to said defendant, St. Paul, Minneapolis and Manitoba Railway Company for the lands hereinabove described, and duly received by it.

Fifth.

That in September, A. D. 1895, said lands hereinbefore described, among others, were classified as mineral by the board of mineral land commissioners under the Act of February 26, 1895 (28 Stat. 683) entitled "An Act to provide for the examination and classification of certain mineral lands in the states of Montana and Idaho." That thereafter the Northern Pacific Railroad Company filed a verified protest with the Register and Receiver of the United States Land Office at Missoula, Montana, against the acceptance of said classification of said board of mineral land commissioners, and thereafter a hearing upon said protest was duly ordered and held and on the 17th

day of June, A. D. 1897, said Register and Receiver of the said land office at Missoula, Montana, adjudged said land to be non-mineral in character; and thereafter an appeal was duly taken from the decision of the said Register and Receiver, to the Commissioner of the General Land Office, and on the 16th day of November, A. D. 1897, the Commissioner of the General Land Office affirmed the decision of the said Register and Receiver of the United States Land Office at Missoula, and thereafter such proceedings were duly had that on April 30th, A. D., 1900, the Secretary of the Interior reversed said decision and held the said land to be mineral in character; that thereafter a motion to review said last mentioned decision was filed by the said Northern Pacific Railroad Company, and on August 1st, A. D. 1900, the said Secretary of the Interior adhered to his former decision of April 30th, A. D. 1900, and held said land to be mineral in character, and thereafter the said classification of said land as mineral by said board of mineral land commissioners hereinbefore mentioned was duly approved by the said Secretary of the Interior on June 15th, A. D. 1901. That through inadvertance and mistake the proper officials of your orator, whose duty it was so to do, did not notify the Register and Receiver of the said United States Land Office at Kalispell, Montana, of the decision of said Secretary of the Interior under date of August 7, A. D. 1900, holding the said land to be mineral in character, and of the approval of said classification by said board of mineral land commissioners, by said Secretary of

the Interior under date of June 15th, A. D. 1901, and did not transmit said decision and approval, or either of them, to said Register and Receiver until the 8th day of May, A. D. 1907.

Sixth.

That the said certificate and receipt hereinbefore referred to insofar as they relate to the lands hereinbefore described, were issued by the said Register and Receiver to said defendant, St. Paul, Minneapolis and Manitoba Railway Company, in reliance by them, and each of them, upon the truth of the said list and affidavit and the statements therein contained filed by said defendant, St. Paul, Minneapolis and Manitoba Railway Company, as aforesaid, and that said patent, insofar as it relates to the lands hereinbefore described, was issued by the officers of the said United States to said defendant, St. Paul, Minneapolis and Manitoba Railway Company, in reliance upon the truth of said list and affidavit hereinbefore described, and the statement therein contained, and said certificate and receipt of the said Register and Receiver, and through the inadvertance and mistake of the officers of your orator in overlooking the decision of the Secretary of the Interior, in letter "N," under date of August 6th, 1900, wherein the said Secretary of the Interior held said land to be mineral in character, and, in overlooking the approval of said classification of said land as mineral by said land commissioners by the Secretary of the Interior under date of June 15th, A. D. 1901.

Seventh.

That said list of lands and affidavit, and each of them, filed by said defendant, St. Paul, Minneapolis and Manitoba Railway Company, as aforesaid, insofar as they and each of them, relate to the lands described herein, were then and there false and fraudulent, as was then and there well known to said defendant, by its officers, agents and attorneys, and that the said list and affidavit and each of them, were then and there filed with intent to deceive the officers of the United States, and to fraudulently obtain and procure the issuance to said defendant of said certificate and receipt by the Register and Receiver of the United States Land Office at Kalispell, Montana, and with intent then and there to deceive the officers of the United States and to fraudulently obtain title to said lands by means of false and fraudulent statements and testimony made and contained in said list and affidavit, in this, to wit: That said lands were not a part and a portion of the public land inuring to said defendant, St. Paul, Minneapolis and Manitoba Railway Company, under the Act of Congress entitled "An act for the relief of settlers upon certain lands in the states of North Dakota and South Dakota," which said Act was approved on August 5, 1892; that said lands were interdicted mineral lands and were not of the character contemplated by said Act; and your orator alleges the fact to be that each and every of the said statements so made by the said defendant, St. Paul, Minneapolis and Manitoba Railway Company, in said list and affidavit as hereinbefore specifically mentioned

and set forth and which are contained in said list and affidavit, to prove that said lands hereinbefore described were of the character contemplated by said Act of Congress, are utterly false and fraudulent and untrue, as the said defendant, St. Paul, Minneapolis and Manitoba Railway Company, then and there well knew; and your orator alleges the fact to be that the said defendant, St. Paul, Minneapolis and Manitoba Railway Company, at the time of filing of said list and affidavit as aforesaid, had full and complete notice and knowledge of the mineral character of said lands.

Eighth.

That said list and affidavit hereinbefore mentioned, and filed as aforesaid, by said defendant, St. Paul, Minneapolis and Manitoba Railway Company, was then and there false, fraudulent and untrue in the several particulars as hereinbefore set forth, and the same were made, filed and offered as proof that said lands were of the character contemplated by said Act of Congress approved August 5, 1892, and entitled "An Act for the relief of settlers upon certain lands in the states of North Dakota and South Dakota," and were then and there filed for the false and fraudulent purpose of imposing upon and deceiving the Register and Receiver of the said United States Land Office, at Kalispell, Montana, and to cause and induce said officers of your orator to believe that the statements contained in said list and affidavit were then and there true, and for the purpose of obtaining and procuring, by means of said fraud and deceit, the issuance of said certificate and receipt by the said Regis-

ter and Receiver as hereinbefore specifically set forth. And that said list and affidavit were then and there filed as aforesaid, insofar as it related to the lands herein described for the false and fraudulent purpose of imposing upon and deceiving the said Register and Receiver of the said United States Land Office at Kalispell, Montana, and to cause and induce the said officers of your orator to believe that the statements and testimony therein contained were true, and that the said lands were of the character contemplated by said Act, and for the purpose of obtaining and procuring, by means of fraud and deceit, the issuance to said defendant of a United States patent for said lands; that the said defendant, St. Paul, Minneapolis and Manitoba Railway Company, by means of said false and fraudulent list and affidavit, insofar as said list and affidavit to the lands hereinbefore described, imposed upon and deceived the said officers and agents of the said United States and caused and induced said officers to believe that the statements and testimony therein contained were true; and your orator alleges that the said officers of the said United States, supposing and believing that the statements and testimony contained in said list and affidavit, insofar as they relate to the lands herein described, were true and relying upon the truth of said statements and testimony so falsely and fraudulently made and given by said defendant, St. Paul, Minneapolis and Manitoba Railway Company, and believing from said statements and testimony contained in said list and affidavit that the said lands were of the character contemplated by said

Act of Congress, were wholly deceived, imposed upon and misled into the issuance of said receipt and certificate to said defendant, St. Paul, Minneapolis and Manitoba Railway Company, and believing that the statements and testimony contained in said list and affidavit were true, and through inadvertance and mistake on the part of the officers of your orator in overlooking letter "H" of August 6, 1910, and the approval of the classification of said lands as mineral by the Secretary of the Interior on June 15, 1901, hereinbefore specifically mentioned, were wholly deceived, imposed upon and misled in permitting the issuance of said United States patent for said lands to said defendant, St. Paul, Minneapolis and Manitoba Railway Company.

Ninth.

That after the issuance of said patent and on or about the 20th day of February, A. D. 1910, this complainant demanded of said defendant, St. Paul, Minneapolis and Manitoba Railway Company, that it reconvey to the United States the lands hereinbefore described; that the said defendant, St. Paul, Minneapolis and Manitoba Railway Company, then and there refused so to do, and still so refuses at the time of the commencement of this action.

Tenth.

That the defendant, Great Northern Railway Company, claims to have some interest in and to the lands hereinbefore described, but that said complainant is not fully and definitely informed as to the precise nature of said claim; and your orator alleges the fact

to be that if the said defendant, Great Northern Railway Company, has any interest in and to the said lands, the said interest was acquired by the said defendant, Great Northern Railway Company, with notiec and knowledge of all the facts hereinbefore set forth at and prior to its acquiring any claim or interest in and to said lands, and that the said defendant, Great Northern Railway Company, never paid any consideration for the interest in and to said lands or any part thereof.

Eleventh.

That the existence of said patent, so fraudulently obtained and procured by the said defendant, St. Paul, Minneapolis and Manitoba Railway Company, as aforesaid, on its face entitles the said defendant, St. Paul, Minneapolis and Manitoba Railway Company to exercise the right of absolute ownership of and over said lands and assert a legal title to the same to which the said defendant, St. Paul, Minneapolis and Manitoba Railway Company, is not entitled. That if said patent remains uncancelled and in force, the same can be used in fraud of your orator and all persons relying upon the same as a valid and substantial conveyance of the legal title to said lands and premises, all of which acts and doings are contrary to equity and good conscience, and done to the manifest injury of your orator.

For as much as your orator can have no adequate relief, except in this court, and to the end, therefore, that the defendants, St. Paul, Minneapolis and Manitoba Railway Company, and Great Northern Railway Company, may, if they can show why your orator

should not have the relief hereby prayed, and make a full disclosure and discovery of the matters aforesaid and according to the best and utmost of their knowledge, remembrance, information and belief, true, direct and perfect answer make to the matters hereinbefore stated and charged, but not under oath, an answer under oath being hereby expressly waived.

And your orator prays that a decree be rendered by this court, declaring null and void the said patent issued to said defendant, St. Paul, Minneapolis and Manitoba Railway Company, for said lands and premises, and requiring, directing and compelling said defendant, St. Paul, Minneapolis and Manitoba Railway Company, to surrender, deliver up, and return the said patent to your orator, and that the said defendants, St. Paul, Minneapolis and Manitoba Railway Company, and Great Northern Railway Company, and the officers, agents and employes of each and both of said defendants, be forever and perpetually restrained and enjoined from setting up, asserting, or claiming any rights, privileges, benefits or advantages under said patent, and your orator prays for all such other orders, decree and judgment in the premises as is just and equitable, and as the circumstances and nature of the case may require.

May it please your Honor to grant unto your orator a writ of subpoena of the United States of America, issued out of and under the seal of this court, directed to the said defendants, St. Paul, Minneapolis and Manitoba Railway Company and Great Northern Railway Company, commanding them on a day certain to

appear and answer unto this bill of complaint, and to abide by and perform such order and decree in the premises as the court shall deem proper and required by the principles of equity and good conscience.

J. C. McREYNOLDS,
Attorney General of the United States.
B. K. WHEELER,
United States Attorney, District of Montana.

(Duly verified).

(Endorsed: Filed Jan. 19, 1914,
GEO. W. SPROULE, Clerk).

Thereafter, on February 7, 1914, a motion to dismiss was duly filed herein, being in the words and figures following, to-wit:

(TITLE OF COURT AND CAUSE.)

Motion to Dismiss.

COME NOW the defendants in the above entitled cause, and each of them, and (pursuant to Rule 29 of the Rules of Practice for the Courts of Equity of the United States, for the purpose of asserting defenses in point of law arising on the face of the amended Bill of Complaint herein, by reason of insufficiency of facts to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea) jointly and severally, move the Court to dismiss this action, and that the complainant take nothing by this action as against the said defendants, or any of them, that the Bill of Complaint be dismissed with prejudice as to said defendants, and as to each of them, and that said defendants go hence without day.

THIS MOTION is based upon the records and files in this cause.

THIS MOTION is made upon the grounds following:

1. Insufficiency of facts in said amended Bill of Complaint to constitute a valid cause of action in equity.

2. It appears from said amended Bill of Complaint that the lands described in said amended Bill of Complaint, the patent to which the complainant seeks to annul, were and are lands that were patented in lieu of other lands covered by a grant, which were relinquished by the grantee in consequence of the failure of the Government and its officers to withdraw the same from sale and entry; and, by said amended Bill of Complaint, it appears that said suit is brought, and recovery is sought, by the complainant for lands that were patented in lieu of other lands covered by a grant, which were relinquished by the grantee in consequence of the failure of the Government and its officers to withdraw the same from sale and entry; and, by reason of the premises, the said suit, as appears from said amended Bill of Complaint, is brought in violation of the provisions of Chapter Thirty-nine (39) of the Acts of the Fifty-fourth Congress of the United States, approved March 2nd, 1896, entitled "An Act to Provide for the Extension of the Time Within Which Suits May Be Brought to Vacate and Annual Land Patents, and for Other Purposes" (29 Statutes at Large, beginning on page 42), and the same is brought without authority of law, and the complainant's alleged

cause of action is barred by the provisions of said statute. That by reason of the premises the said amended Bill of Complaint does not state facts sufficient to constitute a valid cause of action in equity.

VEAZEY & VEAZEY,
Attorneys for Defendants.

(Endorsed: Filed February 7, 1914.
GEO. W. SPROULE, Clerk.)

Thereafter, on March 31, 1914, the District Court aforesaid rendered its decision herein in the words and figures following, to-wit:

(TITLE OF COURT AND CAUSE.)

Decision.

The act March 3, 1891, Sec. 8, provides suits to vacate land patent thereafter issued, must be brought within five years. No matter what error or mistake the land department made, no matter how gross the fraud and misrepresentations of the patentee, after five years this "benign" statute made the voidable patent valid, provided the lands were public lands open to conveyance by the land department.

U. S. vs. Ry. Co., 165 U. S. 476.

U. S. vs. Chandler, 209 U. S. 450.

Act 1896, March 2, extended the aforesaid provisions to railway grant patents. The act last aforesaid accordingly applies to patents to railroads for grant lands secured by fraud and misrepresentation as well as to those erroneously issued, if by the latter term is intended mistakes of the land department alone. Its general meaning, however, and no reason appears why that should not be given it, embraces patents issued

through the patentee's fraud. The act aforesaid further provides that "no suit shall be brought or maintained" to annul patents for lands issued to the beneficiaries of public grants in lieu of granted lands to them lost because of the government's failure to withdraw the latter from entry and sale.

The patent in suit is of the character last aforesaid. The language is clear and plain. "No suit shall be brought or maintained." Again no reason appears why the ordinary or general meaning thereof should not be given, viz, if the lands were public lands open to patent by the land department, once patented inquiry is is closed, suit to annul for any reason prohibited. Such must be the intent of Congress and doubtless for good reason. Said act first provides that in respect to land grant patents in general, whatever the fraud that induced them, after five years no suits should be maintained to annul them; and it second provides that in respect to land grant patents in particular—the special variety—at no time should suits be maintained to annul them, and likewise whatever the fraud that induced them. No exceptions expressed in statutes of limitation and for stronger reason in statutes of confirmation, (for that is the nature of the Act 1896), none will be implied and read in by construction,—not even in cases of fraud. Primarily for defendants' benefit, the legislature is presumed he shall have all thereof save where it inserted some exception.

The motion to dismiss is granted.

March 31, 1914.

GEORGE M. BOURQUIN,
District Judge.

(Endorsed, filed March 31, 1914,
GEO. W. SPROULE, Clerk,
By HARRY H. WALKER, Deputy.)

Thereafter, on March 31, 1914, the court made and entered an order herein dismissing said cause, in words and figures following to-wit:

(TITLE OF COURT AND CAUSE.)

Minute entry of March 31, 1914.

No. 1010. It is ordered that the motion to dismiss in this cause be granted.

Thereafter, on May 28, 1914, the Court made and entered herein its decree in the words and figures following to-wit:

(TITLE OF COURT AND CAUSE.)

Decree.

THIS CAUSE having been heretofore submitted to the Court for decision upon the amended Bill of Complaint herein, and upon the joint and several motion of the defendants herein, to dismiss this cause for want of equity, and for that it appeared upon the face of said amended Bill of Complaint that this action is an action by or on behalf of, or in the interest of, or to the use of the United States, and as such is forbidden by the provisions of the Act of the Fifty-fourth Congress of the United States, approved March 2, 1896, entitled "An Act to Provide for the Extension of the Time Within Which Suits May Be Brought to

Vacate and Annul Land Patents, and for Other Purposes," (29 Statutes at Large, page 42), and for that it appeared from the said amended Bill of Complaint that the lands described in said amended Bill of Complaint, the patent to which the plaintiff seeks to annul, were and are lands, and that said suit was brought, and that recovery was sought by the Complainant, for lands, that were patented in lieu of other lands covered by a grant, which were relinquished by the grantee in consequence of the failure of the Government and its officers to withdraw the same from sale and entry.

Upon the hearing said cause was argued by counsel for the respective parties hereto, and thereafter said motion to dismiss was by the Court sustained, and a decree ordered entered accordingly.

IN CONSIDERATION WHEREOF, and all and singular the matters aforesaid being considered, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the complainant take nothing by this action, and that the Amended Bill of Complaint herein be, and the same hereby is, dismissed with prejudice, and that the defendants herein, Great Northern Railway Company and St. Paul, Minneapolis and Manitoba Railway Company, go hence without day.

This decree is final and on the merits.

Done in open Court this 28th day of May, A. D. 1914, and ordered entered as above.

GEORGE M. BOURQUIN,
District Judge.

Endorsed, filed and entered May 28, 1914,
GEO. W. SPROULE, Clerk.

Thereafter, on the 25th day of November, 1914, filed its appeal herein together with the allowance thereof, which is in the words and figures following:

(TITLE OF COURT AND CAUSE.)

IN EQUITY NO. 1010.

Appeal and Allowance.

The above-named complainant, the United States of America, conceiving itself aggrieved by the decree entered herein on the 28th day of May, A. D. 1914, in the above-entitled proceeding, does hereby appeal from said decree to the Circuit Court of Appeals for the United States for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and it prays that its apepal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the Circuit Court of Appeals of the United States, for the Ninth Circuit, sitting at San Francisco, California.

B. K. WHEELER,
Solicitor for Complainant and Appellant.

The foregoing petition is hereby granted and an appeal is hereby allowed.

Dated this 25th day of November, A. D. 1914.

GEORGE M. BOURQUIN,
Judge of said District Court.

(Endorsed, filed November 25, 1914,
GEO. W. SPROULE, Clerk,
By HARRY H. WALKER, Deputy.)

That on the 25th day of November, 1914, appellant filed herein with its appeal and allowance, its assignment of errors, which are in the words and figures following:

(TITLE OF COURT AND CAUSE.)

IN EQUITY NO. 1010.

Assignment of Errors.

Now on this 25th day of November, A. D. 1914, came complainant, United States of America, by its solicitor, Burton K. Wheeler, United States Attorney for the District of Montana, and says that the decree made and entered in the above entitled cause on the 28th day of May, A. D. 1914, is erroneous and unjust to said complainant, in the following particulars, to-wit:

First: That the court erred in finding that the allegations of the amended bill of complaint herein were insufficient to constitute a cause of action in equity.

Second: That the court erred in finding that, after five years, no matter what error or mistake the land department of the United States of America made, no matter how gross the fraud and misrepresentations of the patentee, St. Paul, Minneapolis and Manitoba Railway Company, were, the Act of Congress of the United States, approved March 3rd, 1891. Section 8, made the voidable patent mentioned in the bill of complaint herein valid, provided, the lands were public lands of the United States of America open to conveyance by the land department of the United States of America.

Third: That the court erred in finding that the Act

of Congress of the United States, approved March 2nd, 1896, extended the provisions of the Act of Congress of the United States, approved March 3rd, 1891, to patents to railroads for grant lands secured by fraud and misrepresentations as well as to those patents erroneously issued.

Fourth: That the court erred in finding that the Acts of Congress of the United States, approved, both respectively, March 3rd, 1891, and March 2nd, 1896, applied to and embraced patents to lands issued through the patentees' fraud.

Fifth: The court erred in finding that the land patent, sought to be annulled and cancelled by this action, was one issued to the beneficiaries of public grants of land in lieu of granted lands lost to such beneficiaries because of the failure of the United States of America to withdraw such granted lands from entry.

Sixth: The court erred in holding that, if the lands described in the bill of complaint herein, were public lands of the United States of America, open to patent by the Land Department, that under the provisions of the Acts of Congress of the United States, approved March 3rd, 1891, and March 2nd, 1896, each respectively, once patent inquiry is closed, suit to annul or cancel the patent is prohibited.

Seventh: That the court erred in finding that no matter what fraud induced the issuance of a patent to land in general by the United States of America, no suit could be maintained to cancel such patent after five years from the date of issuance of such patent.

Eighth: That the court erred in finding that no matter what fraud induced the issuance of patent for grant land by the United States of America, no suit could be maintained at any time to cancel or annul such patent.

Ninth: That the court erred in holding and finding that the cause of action alleged in complainant's bill of complaint herein is not maintainable and is forbidden by the provisions of the Act of the Fifty-fourth Congress of the United States, approved March 2nd, 1896, entitled, "An Act to provide for the Extension of the Time Within Which Suits May Be Brought to Vacate and Annul Land Patents, and for Other Purposes," (29 Statutes at Large, page 42).

Tenth: That the court erred in holding and finding that the lands described in the amended bill of complaint herein, the patent to which plaintiff sought to cancel and annul, were and are lands, and that said suit was brought and that recovery was sought by complainant, for lands, that were patented in lieu of other lands covered by a grant, which were relinquished by the grantee in consequence of the failure of the United States of America and its officers to withdraw said the same from sale and entry.

Eleventh: The court erred in refusing to find and hold that the facts alleged in complainant's bill of complaint were sufficient to constitute a cause of action in equity and that such cause of action was not barred or forbidden by the provisions of the Act of Congress of the United States, approved March 2nd, 1896.

Twelfth: That the court erred in holding that the

bill of complaint herein states no cause for equitable relief.

Thirteenth: That the court erred in sustaining defendants' motion to dismiss complainant's bill of complaint herein with prejudice.

Fourteenth: That the court erred in holding that under the pleadings herein complainant was entitled to no relief in equity as prayed for in the bill of complaint.

Fifteenth: That the court erred in entering a decree herein dismissing complainant's bill of complaint.

WHEREFORE complainant prays that said decree be reversed and said district court be directed to enter a decree herein as is prayed for in its bill of complaint.

Dated November 25, 1914.

BURTON K. WHEELER,
United States Attorney,
Solicitor for Complainant.

(Endorsed, filed Nov. 25, 1914,
GEO. W. SPROULE, Clerk,
By HARRY H. WALKER, Deputy).

Thereafter, on November 25, 1914, a citation on appeal herein was duly issued out of the above entitled court, which is in the words and figures following:

(TITLE OF COURT AND CAUSE.)

Citation on Appeal.

UNITED STATES OF AMERICA—ss.

To St. Paul, Minneapolis and Manitoba Railway Company, a corporation, and Great Northern Railway Company, a corporation, defendants and respondents, and Messrs. Veazey and Veazey, their at-

torneys and solicitors:

GREETING:

You, and each of you, are hereby notified that in the above entitled cause, a proceeding in equity, in the District Court of the United States, in and for the District of Montana wherein the United States of America is complainant and St. Paul, Minneapolis and Manitoba Railway Company and Great Northern Railway Company, corporations, are defendants, an appeal has been allowed the said Complainant, United States of America, therein to the United States Circuit Court of Appeals for the Ninth Circuit, and you, and each of you, are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals, for the Ninth Circuit, at the City of San Francisco, in the state of California, within thirty days from the date hereof, to show cause, if any there be, why the decree mentioned in said appeal, and from which said appeal is taken, should not be corrected and reversed and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable GEORGE M. BOURQUIN, Judge of the District Court of the United States, in and for the District of Montana, this the 25th day of November, A. D. 1914.

GEO. M. BOURQUIN,
Judge of the District Court of the United States, in and for the District of Montana.

Service of the foregoing citation and receipt of a copy thereof this 25th day of November, A. D. 1914,

is hereby admitted and acknowledged.

VEAZEY & VEAZEY,

Solicitors for Defendants and Respondents.

(Endorsed, filed Dec. 1, 1914,

GEO. W. SPROULE, Clerk.)

Thereafter, on December 2, 1914, the above entitled court duly made its order herein, which is in words and figures following:

(TITLE OF COURT AND CAUSE.)

Order Extending Time to Prepare, Etc., Record on Appeal.

Upon good cause shown, it is hereby ordered that complainant and appellant in the above entitled cause, may have thirty days in addition to the time allowed by law and the rules of the court within which to have prepared and certified up to the United States Circuit Court of Appeals for the Ninth Circuit the record on appeal herein.

Dated December 2nd, 1914.

GEO. M. BOURQUIN,

Judge.

Thereafter, on December 2, 1914, appellant duly served and filed herein its praecipe for a transcript of the record on appeal herein, which is in words and figures following, towit:

(TITLE OF COURT AND CAUSE.)

Praecipe for Transcript of Record.

To St. Paul, Minneapolis and Manitoba Railway Company, and Great Northern Railway Company, defendants and respondents, and Messrs. Veazey & Veazey, their solicitors:

The undersigned, solicitor for complainant and appellant herein, hereby files and serves upon you its praecipe, in conformity with the rules of court, indicating the portions of the record in the above entitled cause, to be incorporated into the transcript on appeal herein, and which said portions of said record you are hereby notified the said complainant and appellant will incorporate and include in the record on appeal herein:

Said portions are as follows:

1. The amended bill of complaint,

2. Defendants' motion to dismiss the amended bill of complaint;

3. The above entitled court's decision dated March 31, 1914, granting defendants' motion to dismiss the amended bill of complaint herein;

4. Minute entry order dated March 31, 1914, ordering the above entitled cause to be dismissed;

5. Decree made and entered in the above entitled cause on the 28th day of May, 1914, dismissing said cause and said amended bill of complaint;

6. Copy of appeal and allowance thereof by the court;

7. Assignment of errors;

8. Citation on appeal and admission of service by defendants;

9. Order extending time for completing and transmitting the record on appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit;

10. Copy of this praecipe.

The entire judgment roll as the same appears of record in the office of the clerk of the above entitled

court is not included herein, as only those portions of it which are specified in paragraphs numbered 1, 2, 4 and 5 of this praecipe are considered necessary for the purpose of the appeal herein.

BURTON K. WHEELER,
United States Attorney, District of Montana.
Solicitor for Complainant and Appellant.

Service of the foregoing praecipe and receipt of a copy thereof this 2nd day of December, 1914, is hereby admitted and acknowledged.

VEAZEY & VEAZEY,
Solicitors for Defendants and Respondents.

(Endorsed, filed Dec. 10, 1914,
GEO. W. SPROULE, Clerk,
By HARRY H. WALKER, Deputy.)

Clerk's Certificate to Transcript of Record.

United States of America,
District of Montana. } *ss.*

I, George W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of ..... pages, numbered from 1 to ...., inclusive, is a true and correct transcript of the amended bill of complaint, motion to dismiss, decision of the court, minute order dismissing bill of complaint, decree, appeal and allowance, assignment of errors, citation on appeal and acknowledgment of service thereof, order of court extending time for completing and transmitting record on appeal herein, and copy of praecipe for transcript of

record and acknowledgement of service thereof, and the whole thereof as appears from the original records and files of said court in my possession as such clerk; and I do further certify that I transmit herewith the original citation issued in said case.

I do further certify that the costs of the transcript of record amount to the sum of $....., and have made a charge against appellant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this ..... day of January, A. D. 1915.

.....

Clerk.

(*SEAL*)

30 No. 2564.

United States Circuit Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, APPELLANT,
vs.
ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY, a corporation, and Great Northern Railway Company, a corporation, appellees.

Upon appeal from the United States Court for the District of Montana.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

32 At a stated term, to wit, the October term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court room thereof, in the city and county of San Francisco, in the State of California, on Thursday, the thirteenth day of May, in the year of our Lord one thousand nine hundred and fifteen:

Present: The Honorable William B. Gilbert, circuit judge, presiding; Honorable Erskine M. Ross, circuit judge; Honorable Frank H. Rudkin, district judge.

[Title of cause.]

ORDER OF SUBMISSION.

Ordered above-entitled cause argued by Mr. United States Attorney Burton K. Wheeler, counsel for the appellant, and by Mr. I. Parker Veazey, counsel for the appellees, and submitted to the court for consideration and decision.

33 At a stated term, to wit, the October term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court room thereof, in the city and county of San Francisco, in the State of California, on Thursday, the twenty-seventh day of May, in the year of our Lord one thousand nine hundred and fifteen:

Present: The Honorable William B. Gilbert, circuit judge, presiding; Honorable Erskine M. Ross, circuit judge; Honorable Frank H. Rudkin, district judge.

[Title of cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE.

Ordered that the typewritten opinion this day rendered by this court in the above-entitled cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with said opinion.

34 [Title of court and cause.]

[Opinion, U. S. Circuit Court of Appeals.]

Upon appeal from the United States District Court for the District of Montana.

Burton K. Wheeler, U. S. attorney; Homer G. Murphy, asst. U. S. attorney; and Frank Woody, asst. U. S. attorney, for the Government.

Veazey & Veazey for the appellees.

Before Gilbert and Ross, circuit judges, and Rudkin, district judge.

RUDKIN, District Judge: By the act of March 3, 1857 (11 Stat., 195), and the act of March 3, 1865 (11 Stat., 525), there was granted to the Territory of Minnesota certain public lands for the purpose of aiding in the construction of railroads in that Territory.

35 The appellee, the St. Paul, Minneapolis and Manitoba Railway Company, has succeeded to all the rights and privileges of the Territory of Minnesota under the provisions of these acts. At the time the grant was made the Missouri River formed the western boundary of the Territory, but soon thereafter the State of Minnesota was admitted into the Union with its western boundary fixed at a point considerably east of the western boundary of the former Territory. In the administration of this land grant the land department held that it was the fixed policy of the Government to limit grants in aid of railroads wholly within a State or Territory to lands lying within the same State or Territory, and the claim of the railroad company to lands within the limits of the grant but without the limits of the State of Minnesota was rejected. In St. Paul, etc., Ry. Co. v. Phelps, 137 U. S., 528, it was held that the specific terms of the act of Congress could not be limited or controlled by any general governmental policy, and the title of the railway company to lands within the limits of the grant but west of the western boundary of the State was accordingly confirmed. To obviate the hardships to settlers resulting from this decision, the act of August 5, 1892, entitled "An act for the relief of settlers upon certain lands in the States of North Dakota and South Dakota" was passed. The preamble to that act recites that:

"Whereas under the rulings of the General Land Office the extension into Dakota Territory, now States of North Dakota and South Dakota, of the limits of the grants of land made by Congress to aid in the construction of the several lines of railroads now owned by the Saint Paul, Minneapolis and Manitoba Railway Company was denied, and in consequence of said rulings lands within the limits of the said grants in said States have been claimed, settled upon, occupied, and improved by numerous persons in good faith under

36 color of title or of right to do so derived from the various laws of the United States relating to the public domain, and are now

claimed by them, their heirs, or assigns, and many of said lands have actually been patented to such occupants or to their grantors; and

"Whereas under recent construction of said grants the said occupants, improvers, or purchasers, are liable to be evicted from their holdings: Now, therefore, for the purpose of relieving the said occupants, improvers, and of the said granted lands from the hardship of being now deprived of the same under the circumstances aforesaid, Be it enacted," etc.

Section 1 then provides:

"That the Secretary of the Interior shall, as soon as conveniently may be done, cause to be prepared and delivered to the said railway company a list of the several tracts which have been purchased, claimed, occupied, and improved, as stated in section two of this act, and are now claimed by such purchasers or occupants, their heirs or assigns, according to the smallest Government subdivisions. Within a reasonable time after the receipt by the said railway company of the said list, it shall execute under its corporate seal and deliver to the Secretary of the Interior its deed of conveyance releasing to the United States all its claims upon the lands described in said list, and shall also procure and cause to be released to the United States all liens and claims to said lands derived through or under said company, whereupon all right, title, and interest of the said railway company to each of such tracts shall revert to the United States, and such tracts shall be treated, under the laws thereof, in the same manner as if no rights thereto had ever vested in the said railway company. * * * "

37 Section 2 provides:

"That the said railway company is hereby permitted to select in lieu of any lands forming odd-numbered sections or parts thereof situated in the State of North Dakota or in the State of South Dakota, within the ten mile limits of a grant of lands made to the Territory of Minnesota * * * opposite to and coterminous with such portion of said railroad as was constructed and completed within the time required by the said grant and the acts amendatory thereof for the construction and completion of the whole or said railroad, which prior to January first, anno Domini eighteen hundred and ninety-one, any person had purchased or occupied or improved, in good faith, under color of title or right to do so, derived from any law of the United States relating to the public domain, but not including any lands within the limits of the grant, to aid in the construction of the Saint Vincent branch of said road, as located under the act of March third, eighteen hundred and seventy-one, upon which any person or persons had, in good faith, settled and made or acquired valuable improvements thereon prior to March, eighteen hundred and seventy-seven, an equal quantity of non mineral public lands, so classified as non mineral at the time of actual Government survey which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of

such selection lying within any State into or through which the railway owned by said company runs, to the extent of the lands so relinquished and released. * * *"

Section 3 provides:

"That upon the filing by the said railroad company, at the local land office of the land district in which any tract of land se-
38 lected in pursuance of this act shall lie, a list describing the tract or tracts selected, and the payment of the fees prescribed by law in analogous cases, and the approval of the Secretary of the Interior, he shall cause to be executed, in due form of law, and deliver to said company, a patent of the United States, conveying to it the lands so selected. * * *"

On the 31st day of March, 1906, the appellee, the St. Paul, Minneapolis and Manitoba Railway Company, filed in the United States Land Office at Kalispell, Montana, a certain list of lands describing, among others, the lands now in controversy pursuant to the provisions of section 2 of the act of 1892, supra. This list was thereafter approved by the Secretary of the Interior, and on the 24th day of June, 1907, a patent issued therefor. The present suit was instituted by the United States to set aside this patent on the ground of fraud and mistake—fraud on the part of the railway company in repreesening that the land was non-mineral in character, and mistake on the part of the Land Department in failing to notify the register and receiver of the United States Land Office at Kalispell, Montana, that the lands had been classified as mineral by the board of mineral land examiners under the act of February 26, 1895 (28 Stat., 683), and of a decision of the Secretary of the Interior approving and sustaining this classification. Inasmuch as the right of the Government to maintain the suit at all is the only question presented for our consideration, a more detailed statement of the allegations of the bill of complaint is deemed unnecessary.

Section 1 of the act of March 2, 1896 (29 Stat., 42), provides as follows:

"That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the
39 passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed: Provided, That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure

of the Government or its officers to withdraw the same from sale or entry."

The court below held that the prosecution of the present suit was prohibited by the proviso to the latter section, and from the decree of dismissal this appeal was allowed and prosecuted.

Notwithstanding a suggestion in the Government brief to the contrary, we think it clearly appears from the allegations of the bill of complaint that the land in controversy was patented to the railway company "in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry." The patent was applied for and issued under the act of 1892, and the lands granted by that act were in lieu of lands relinquished by the railway company in consequence of the failure of the Government and its officers to withdraw the Dakota lands within the limits of the original grant from sale or entry. Does, then, the proviso to the act of 1896 prohibit the maintenance of this suit? Such would
40 seem to be the plain import of the language used, but we will consider briefly the argument of the Government in support of the opposite view. It is first contended that the proviso has no application to this case because it is by its terms limited to lands patented prior to the passage of the act. We can not so construe it. In a former part of the section specific reference is made to patents "heretofore" erroneously issued, and to patents "hereafter" issued, and if Congress intended to limit the proviso to lands patented prior to the passage of the act it would have used appropriate and specific language for that purpose. The expression "that were certified or patented" refers to the mode in which the title was acquired rather than to the time of its acquisition. Legislative acts are presumed to be prospective in their operation and courts will not limit them to past acts or past transactions unless such clearly appears to have been the legislative intent. Why grants of this particular kind were excepted from the general rule permitting suits to annul land patents we are not advised. The reason suggested by the railway company, namely, that the company had relinquished lands the title to which had been confirmed by a decision of the Supreme Court of the United States and was awarded lands with an equally indefensible title does not appeal to us. Had the proviso been attached to the lieu-land or relief act of 1892 the reason suggested would be a cogent one, but when we find it attached to an enactment years later in point of time and of general application the argument loses all its force. But we may only consider the reason for the enactment as an aid to construction, and we see no reason why patents issued prior to the passage of the act should stand upon a different footing from patents issued thereafter. We are far from convinced that Congress so intended. The contention on the part of the Government that
41 the proviso does not apply where patents have been procured through fraud on the part of the grantee or through mistake on the part of the Government or its officers, or where mineral lands

have been patented under agricultural land laws or vice versa calls for but passing notice. Fraud and mistake are the principal grounds, if not the only grounds, upon which land patents can be assailed or annulled, and to hold that the act does not apply in such cases would be to repeal it by judicial construction. As said by the Supreme Court of the United States in United States v. Winona, etc., Ry. Co., 165 U. S., 463, 476:

"Under the benign influence of this statute it would matter not what the mistake or error of the Land Department was, what the frauds and misrepresentation of the patentee were, the patent would become conclusive as a transfer of the title, providing only that the land was public land of the United States and open to sale and conveyance through the Land Department."

This case was approved in United States v. Chandler-Dunbar Water Power Co., 209 U. S., 447, 450, where the court said:

"The patent had been issued in 1883 by the President in due form and in the regular way. Whether or not he had authority to make it, the United States had power to make it or to validate it when made, since the interest of the United States was the only one concerned. We can see no reason for doubting that the statute, which is the voice of the United States, had that effect. It is said that the instrument is void and hence was no patent. But the statute presupposes an instrument that might be declared void. When it refers to 'any patent heretofore issued,' it describes the purport and source of the document, not its legal effect. If the act were confined to valid patents it would be almost or quite without use."

42 If a bill of complaint to annul a patent charged neither fraud nor mistake the defendant would require the aid of no statute of repose, no statute of confirmation, for his protection. He would find ample defense and protection in the deficiencies of the complaint itself.

We are satisfied, therefore, that the prosecution of this suit is prohibited by law, and the decree of the court below is accordingly

Affirmed.

(Endorsed:) Opinion. Filed May 27, 1915. F. D. Monckton, clerk.

43 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2564.

UNITED STATES OF AMERICA, APPELLANT,
vs.
ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY Company, a Corporation, and Great Northern Railway Company, a Corporation, appellees.

DECREE.

Appeal from the District Court of the United States for the District of Montana.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Montana, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said District Court in this cause be, and hereby is, affirmed.

(Endorsed:) Decree. Filed and entered May 27, 1915. F. D. Monckton, clerk.

44 [Title of court and cause.]

PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

The above-named appellant, United States of America, respectfully shows that the above-entitled cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit, and that a judgment has therein been rendered on the 27th day of May, A. D. 1915, affirming the decree of the District Court of the United States for the District of Montana, and that the matter in controversy in said suit exceeds the sum of one thousand dollars besides costs; that this cause is one in which the United States Circuit Court of Appeals for the Ninth Circuit has final jurisdiction, and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore the said appellant prays that an appeal be allowed to it in the above-entitled cause directing the clerk of the United States Circuit Court of Appeals for the Ninth Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by the said appellant may be reviewed and, if error be found, corrected according to the laws and customs of the United States.

(Signed) BURTON K. WHEELER,
United States Attorney, District of Montana.

(Endorsed:) Filed Nov. 23, 1915.

45 [Title of court and cause.]

ASSIGNMENT OF ERRORS ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO THE SUPREME COURT OF THE UNITED STATES.

The appellant in the above-entitled cause, in connection with the petition for appeal herein, presents and files therewith the following assignment of errors, as to which matters and things it says that the decree entered herein on the 28th day of May, 1914, is erroneous, to wit:

First. That the court erred in adjudging that the allegations of the amended bill of complaint herein were insufficient to constitute a cause of action in equity.

Second. That the court erred in adjudging that the act of the Congress of the United States approved March 2nd, 1896 (29 Stat. L., pg. 42), extended the provisions of the act of the Congress of the United States approved March 3rd, 1891 (26 Stat. L., pg. 1098), to patents to railroads secured by fraud or misrepresentation as well as to those erroneously issued.

Third. That the court erred in adjudging that the act of the Congress of the United States approved March 2nd, 1896 (29 Stat. L., pg. 42), applied to and embraced patents to lands obtained and secured through the patentee's fraud.

Fourth. The court erred in adjudging that, the lands described in the amended bill of complaint herein being public lands of the United States open to patent by the Land Department, under the pro-
46 visions of the act of the Congress of the United States approved March 2nd, 1896 (29 Stat. L., pg. 42), suit to cancel or annul the patent is prohibited even though such patent was procured or obtained by fraud.

Fifth. The court erred in adjudging that the cause of action alleged in the amended bill of complaint herein is not maintainable and is forbidden by the provisions of the act of the Congress of the United States approved March 2nd, 1896, entitled "An act to provide for the extension of the time within which suits may be brought to vacate and annul land patents and for other purposes" (29 Stat., L., pg. 42).

Sixth. The court erred in refusing to find and hold that the facts alleged in complainant's amended bill of complaint were sufficient to constitute a cause of action in equity and that such cause of action was not barred or forbidden by the provisions of the act of the Congress of the United States approved March 2nd, 1896 (29 Stat. L., pg. 42).

Seventh. That the court erred in sustaining defendants' motion to dismiss the complainant's amended bill of complaint.

Wherefore the appellant prays that said decree may be reversed and that the appellant may have an adjudication and decree in their favor as herein specified.

(Signed) BURTON K. WHEELER,
United States Attorney, District of Montana.

(Endorsed): Filed Nov. 23, 1915.

47 [Title of court and cause.]

AFFIDAVIT AS TO AMOUNT IN CONTROVERSY.

UNITED STATES OF AMERICA,
District of Montana, ss:

Burton K. Wheeler, being duly sworn, on his oath says that he is the duly appointed, qualified, and acting United States attorney for the District of Montana; that the matter in controversy in the above-

entitled action exceeds the sum of one thousand dollars, exclusive of costs.

(Signed) BURTON K. WHEELER.

Subscribed and sworn to before me this 16th day of November, A. D. 1915.

[SEAL.] (Signed) GEO. W. SPROULE,
Clerk United States District Court, District of Montana.

(Endorsed:) Filed Nov. 23, 1915.

48 [Title of court and cause.]

ORDER ALLOWING APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

It is hereby ordered that the appeal in the above-entitled case to the Supreme Court of the United States be, and is hereby, allowed as prayed.

(Signed) WM. W. MORROW,
United States Circuit Judge, Ninth Circuit.

Dated at San Francisco, California, this 23d day of November, A. D. 1915.

(Endorsed:) Filed Nov. 23, 1915.

49 [Title of court and cause.]

STIPULATION.

It is hereby stipulation and agreed by and between counsel for the respective parties to the above-entitled action, appellant and appellees, that the original bill of complaint in the above-entitled action was filed in the office of the clerk of the District Court of the United States for the District of Montana on the 19th day of October, 1910, and that a subpœna in equity in said action was duly issued out of the office of the clerk of said court on the 19th day of October, 1910, and that service of said subpœna in equity was accepted and admitted by counsel for the defendants and appellees on the 26th day of October, 1910.

BURTON K. WHEELER,
Counsel for Appellant.
VEAZEY & VEAZEY,
Counsel for Appellees.

(Endorsed:) Filed Dec. 9, 1915.

50 [Title of court and cause.]

To the CLERK OF SAID COURT.

SIR: Please make and issue a certified transcript of the record on appeal to the Supreme Court of the United States in the above-entitled cause, consisting of the following:

1. Copy of printed transcript of record on which the above-entitled cause was heard in the said Circuit Court of Appeals, to which will

be added a typewritten copy of the following-entitled proceedings that were had, and of the papers that were filed in said Circuit Court of Appeals, viz:

2. Order of submission, entered May 13, 1915.

3. Order entered May 27, 1915, directing filing of opinion and filing and recording decree.

4. Opinion filed May 27, 1915.

5. Decree filed and entered May 27, 1915.

6. Petition for appeal to Supreme Court U. S., assignment of errors on appeal to Supreme Court U. S., affidavit as to amount in controversy, and order allowing appeal to Supreme Court U. S., filed Nov. 23, 1915.

7. Stipulation with reference to the filing of the original bill of complaint, filed Dec. 9, 1915.

8. Præcipe for certified transcript of record on appeal to Supreme Court U. S., filed Dec. 9, 1915.

9. Certificate of clerk U. S. Circuit Court of Appeals to transcript of record; and

10. Original citation on appeal to Supreme Court U. S.

Omit the title of the court and of the cause from the latter proceedings and papers except the decree, and in lieu of said omitted titles insert the following "[Title of court and cause]."

Omit all endorsements on the latter proceedings and papers excepting that portion thereof showing the date of filing and the admission or acknowledgement of service.

BURTON K. WHEELER,
Counsel for Appellant.

(Served:) Dec. 2, 1915.
(Endorsed:) Filed Dec. 9, 1915.

51 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY Company, a corporation, and Great Northern Railway Company, a corporation, appellees. } No. 2564.

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS TO TRANSCRIPT OF RECORD UPON APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

I, Frank D. Monckton, as clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing fifty (50) pages, numbered from and including 1 to and including 50, to be a full, true, and correct copy of the complete record made pursuant to the præcipe filed by counsel for the appellant on the 9th day of December, A. D. 1915, under rule 8 of the Supreme Court of the United States, in the above-entitled case, including the assignment of errors on appeal to the Supreme Court of the United States, and of all proceedings had, and of all papers, including the opinion, filed in

the said Circuit Court of Appeals in the above-entitled case, as the originals thereof remain on file and appear of record in my office, and that the same, together, constitute the transcript of record on appeal to the Supreme Court of the United States in the above-entitled cause as made and certified pursuant to the said præcipe.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this tenth day of December, A. D. 1915.

[SEAL.] F. D. MONCKTON, *Clerk*,
By MEREDITH SAWYER,
Deputy Clerk.

52 United States Circuit Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, APPELLANT,
vs.
ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY Company, a corporation, and Great Northern Railway Company, a corporation, appellees.

CITATION ON APPEAL FROM UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO THE SUPREME COURT OF THE UNITED STATES.

The United States of America, Ninth Circuit, to the St. Paul, Minneapolis and Manitoba Railway Company, a corporation, and the Great Northern Railway Company, a corporation:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, in the District of Columbia, sixty days after the date of this citation, pursuant to an appeal allowed and filed in the clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein the United States of America is appellant and you are the appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable William W. Morrow, judge of the United States Circuit Court of Appeals for the Ninth Circuit, this 23d day of November, A. D. 1915.

WM. W. MORROW,
Judge United States Circuit Court of Appeals, Ninth Circuit.

53 Service of the within and foregoing citation on appeal is hereby accepted and receipt of copy thereof acknowledged this 2nd day of December, 1915.

VRAKEY & VRAKEY
(I. PARKER VRAKEY
and
I. PARKER VRAKEY, Jr.),
Counsel for Appellees.

54 (Indorsed:) No. 2564. United States Circuit Court of Appeals, Ninth Circuit. United States of America, appellant, vs. St. Paul, Minneapolis and Manitoba Railway Company, a corporation, and Great Northern Railway Company, a corporation, appellees. Citation on appeal to Supreme Court of the United States. Filed Dec. 9, 1915. Frank D. Monckton, clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By Meredith Sawyer, deputy clerk.

55 Service of the within and foregoing certified transcript of record is hereby acknowledged and copy thereof received this 20th day of December, 1915.

VREZEY & VREZEY
(I. PARKER VREZEY,
I. PARKER VREZEY, Jr.),
Solicitors for Appellees.

(Indorsed on cover:) File No. 25,065. U. S. Circuit Court Appeals 9th Circuit. Term No. 782. The United States, appellant, vs. St. Paul, Minneapolis & Manitoba Railway Company and Great Northern Railway Company. Filed December 29th, 1915. File No. 25,065.

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In the Supreme Court of the United States.

OCTOBER TERM, 1917.

THE UNITED STATES, Appellant,
v.
ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY AND GREAT NORTHERN RAILWAY COMPANY. | No. 75.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The appeal of the United States in this case (R. 37) is from a decree of the Circuit Court of Appeals for the Ninth Circuit (R. 36) affirming a decree of the District Court of the United States for the District of Montana (R. 18) dismissing the Government's amended bill of complaint (R. 1–14).

Opinions, D. C. (R. 16), C. C. A. (R. 32), 225 Fed. 27.

The bill sought the cancellation of a patent for lands in Montana issued to the Railway Company

on June 24, 1907 (R. 5), under the Act of August 5, 1892 (27 Stat. 390), alleging that the land was known mineral and was so classified, whereas the Act granted only nonmineral lands, classified as such, and that the patent was procured by fraud of the Company in falsely representing the land in question to be nonmineral (R. 3–5, 8–11), and through inadvertence of the officers of the Land Department in overlooking the fact that the land had been classified as mineral (R. 5–7).

The decisions of the lower courts (R. 16, 32) turned primarily upon their construction of the Act of August 5, 1892 (27 Stat. 390), under which the patent was issued. That Act dealt with a particular situation which needs to be stated.

History of the Granting Act of 1892.

The Act of March 3, 1857 (11 Stat. 195), and subsequent amendatory Acts, granted lands along the line of the Company's road in the Territory of Minnesota which in 1857 embraced portions of the present States of North and South Dakota. The Land Department ruled that this grant extended no further than the western boundary of the State of Minnesota which was admitted to the Union on May 11, 1858 (11 Stat. 285), before the definite location of the road. This decision of the Land Department was overturned in *St. Paul &c Railway Co.* v. *Phelps*, 137 U. S. 528, where it was held that the grant extended to the territorial limits of Minnesota as they existed at the date of the original

grant, and that the Railway Company, upon location and construction of its road, owned the lands within those limits in the Dakotas. Meanwhile, in consequence of the Land Department decision, Dakota lands embraced in the grant were entered, settled upon and improved, and in many cases patented, under the public land laws. To remedy this situation an agreement of exchange between the Government and the Company was negotiated which resulted in the Act of August 5, 1892.[1]

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[1] The matter is stated in the Report of the Commissioner of the General Land Office for 1893 at page 57 as follows:

"Under rulings of this office and Department holding that the grants to the St. Paul, Minneapolis and Manitoba Railroad Company were restricted to the State line of Minnesota, certain lands in North Dakota and South Dakota were opened to settlement and entry. The Supreme Court of the United States, in the case of said company vs. Ransom Phelps (137 U. S. 528), decided that said grants were not limited to said State line, but extended into the Dakotas, and the limits of the grants were extended accordingly. It was thereupon found that large quantities of the lands falling within the extended limits had been settled upon and entered, and, in a number of cases, patents had issued.

"The settlers and entrymen thus became liable to eviction, and with a view to protect them, the Senate, on February 28, 1891, passed a resolution directing that a negotiation with the company be had with a view to a release by it of such of the lands as had been settled upon and entered. Accordingly, a correspondence with the company was opened which resulted in the passage of the act which was approved August 5, 1892."

The Senate resolution here referred to, after reciting the situation, reads as follows (Cong. Rec., vol. 22, pt. 4, p. 3539):

"*Resolved*, That the Secretary of the Interior be, and he he is hereby, directed to negotiate, subject to the approval of

In its preamble the Act recited the situation generally[1] and then provided for carrying out the exchange agreement as follows (27 Stat. 390): The Secretary of the Interior was to furnish the Railway Company a list of the Dakota lands embraced in the grant which had been taken by settlers under the

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Congress, with the St. Paul, Minneapolis and Manitoba Railway Company with a view to securing its consent to make selections of other public lands, not mineral in character, in lieu of such of the lands to which it may be entitled by force of a decision of the Supreme Court rendered on the 22nd day of December, 1890, in the case wherein it was plaintiff and Ransom Phelps defendant, as have heretofore been patented by the United States, or to which any settler may have acquired rights under the land laws of the United States."

See also General Land Office Report for 1892, p. 42.

[1]The Act recited the following (27 Stat. 390):

"Whereas under the rulings of the General Land Office the extension into Dakota Territory, now States of North and South Dakota, of the limits of the grants of land made by Congress to aid in the construction of the several lines of railroad now owned by the St. Paul, Minneapolis and Manitoba Railway Company was denied and in consequence of said rulings lands within the limits of the said grants in the said States have been claimed, settled upon, occupied, and improved by numerous persons in good faith under color of title or of right to do so derived from the various laws of the United States relating to the public domain, and are now claimed by them, their heirs, or assigns, and many of said lands have actually been patented to such occupants or to their grantors; and

"Whereas under recent construction of said grants the said occupants, improvers, or purchasers, are liable to be evicted from their holdings: Now, therefore, for the purpose of relieving the said occupants, improvers, and purchasers of the said granted lands from the hardship of being now deprived of the same under the circumstances aforesaid."

public land laws, and the Company was to execute its deed of conveyance therefor to the United States and to extinguish all liens and claims thereon derived through the Company (§1). In consideration of such conveyance the Company was to be permitted to select "an equal quantity of nonmineral public lands, so classified as nonmineral at the time of actual Government survey . . . within any State into or through which the railway owned by said railway company runs" (§ 2). Selections were to be made subject to approval by the Secretary of the Interior and patents therefor were to issue (§ 3). Finally the Act was made conditional upon its acceptance by the Company within ninety days (§ 4).

The Act was accepted by resolution of the board of directors of the Company August 24, 1892 (15 L. D. 344, 345); the list of Dakota lands, amounting to 44,745.31 acres, was furnished to it by the Secretary; a conveyance of these lands was made by the Company to the United States; and the Company was thereupon permited to select an equal quantity of land of the specified character in the States of Minnesota, North Dakota, South Dakota, Montana, Idaho, and Washington (General Land Office Circular of November 30, 1892, 15 L. D. 536–537; General Land Office Report for 1893, p. 57).

Both the lower courts held (R. 16, 32) that this suit, brought to cancel one of the patents for lands in Montana, was prohibited by section 1 of the Lim-

itation Act of March 2, 1896 (29 Stat. 42), which reads as follows:

> That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this Act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed: *Provided*, That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry.

The decision in both lower courts (R. 16, 32) was that any patent issued at any time[1] under the Act of August 5, 1892, was of the character specified in the above quoted proviso, and therefore

[1] The patent in this case was issued after the Act of 1896, namely, on June 24, 1907 (R. 8).

within the inhibition against a suit to cancel it, notwithstanding it conveyed land of a character reserved by the Act and notwithstanding it was procured by fraud on the part of the company or inadvertence on the part of the officials of the Land Department.

This proviso, like the Act of 1892, dealt with another particular but very different situation, which will now be stated.

History of the Proviso to Section 1 of the Limitation Act of 1896.

The Act of March 3, 1887 (24 Stat. 556), directed the Secretary of the Interior to adjust all unadjusted railroad land grants and to demand a relinquishment or reconveyance of any lands found to have been erroneously certified or patented, and, in case of failure to reconvey within ninety days, it was made the duty of the Attorney General to institute suits to cancel such certificates or patents. Four years later, by section 8 of the Act of March 3, 1891 (26 Stat. 1095, 1099), it was provided "That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this Act." The work of adjustment under the Act of 1887 revealed many erroneous land grant patents for the annulment of which suits had to be brought. But the adjustment work was slow, and it was seen that long before the adjustments could be completed

the limitation period prescribed in the Act of 1891 would expire. The President, therefore, on January 17, 1896, reported the situation to Congress and recommended the repeal of the limitation (H. Doc. No. 151, 54th Congress, 1st session). The committee on Public Lands of the House, in its report dated February 4, 1896, disagreed with the President upon the desirability of repealing the limitation altogether, but recognized the necessity of extending the period for five years as to patents theretofore erroneously issued under special grants, and also of continuing in force a limitation period running from the date of the patent as to all patents thereafter issued.

The bill recommended by the committee did not contain the proviso now in question, or anything like it, and the situation which afterwards called for it on the floor of the House was not mentioned in the report. (H. Rep. No. 253, 54th Congress, 1st session.[1] Section 1 of the bill (H. R. 5475) reported by the committee on February 15, 1896 (Cong. Rec., vol. 28, p. 1760), with slight amendments (pp. 1936, 2169), was identical with section 1 as it finally passed, but without the proviso in question. While the bill, without the proviso, was under discussion on the floor of the House, the particular situation which called for the proviso was for the first time

[1]This report, containing the President's message and the documents on which the message was based, is printed in the appendix.

pressed upon the attention of that body. The situation was this:

By the Act of July 2, 1864 (13 Stat. 356, 364), the Burlington and Missouri River Railroad Company was granted ten alternate sections per mile on each side of its road in Nebraska. The Land Department failed for a considerable period to withdraw the land from entry, in consequence of which granted lands south of the line were taken by settlers. The Company was thereupon permitted by the Land Department, without any authority of law, to go outside of the granted limits on the north side of the line and take lands in lieu of those taken by the settlers on the south side to the amount of 200,364.70 acres, for which patents were issued and which were in turn sold by the Railroad Company. Upon the decision in *United States* v. *Burlington, etc., R. R. Co.*, 98 U. S. 334, 342, that the granting Act contemplated that one-half of the land should be taken on each side of the road, and that "the department could not enlarge the quantity on one side to make up a deficiency on the other," proceedings were directed under the Adjustment Act of 1887 "to reinvest the title of said lands in the United States." *The Burlington & Mo. River R. R. Co.*, 6 L. D. 589, 592-593. A suit for this purpose had been recommended and was pending when the matter came before Congress. *Chapman* v. *Burlington & Mo. River R. R. Co.*, 20 L. D. 496, 497; *Ruhga* v. *Burlington & Mo. River R. R. Co.*, 25 L. D. 38, 39.

This state of affairs was first brought to the attention of Congress by Mr. Hepburn of Iowa on February 18, 1896, when the bill, without the proviso to section 1, was under discussion in the House. He said (28 Cong. Rec. p. 1906):

> In another instance that I am familiar with, Mr. Speaker, in your own State [Mr. Mercer in the chair], there was a grant to a company when practically, by an error or an oversight on the part of the officers of the United States, the lands lying on the line on either side of the file plat of the road were not withdrawn from market for a considerable period. Settlers came in and took these lands. Later, when the railroad was constructed, it was found that there was not within the limits of the grant a sufficient quantity to meet the purposes of the grant. The Department held that lieu lands might be given—lands in another locality—and the company was compelled to go away beyond its grant to lands that did not have the benefit of the construction of this road and take 201,000 acres, and one block of 10,000 acres of it they sold for $2,500—25 cents an acre; but they took these lands under the then ruling of the Department.
>
> . . . Then they changed the ruling and held that lands must be taken within the prescribed limits or else the entries and selections were void. Now, one of the suits ordered is to recover the title of these lands taken in lieu of those that the company lost through the failure of the Federal officers to withdraw the lands from market.

Thereupon Mr. Lacey, chairman of the committee and in charge of the bill, proposed the present proviso as an amendment in order to meet the particular situation stated by his colleague. He said (same page):

> Mr. Speaker, this bill, in every line of it, from the beginning to the end, was drawn with special reference to the protection of the rights of bona fide purchasers. As to the instance that my colleague cites as having occurred in Nebraska, I propose at the proper time to offer an amendment which I think will cover the points he has in mind. I will send the amendment to the clerk's desk to be read as a part of my remarks, so that it may appear in the Record for the information of members.
>
> The amendment was read as follows:
>
> "Add at the end of section 1: '*Provided*, That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry.'"

When consideration of the bill was resumed on the following day, the chairman's amendment was formally offered whereupon he made the following explanation (p. 1937):

> Mr. LACEY. Now, Mr. Speaker, a word of explanation. My colleague [Mr. Hepburn]

on yesterday explained that in Nebraska and in some other localities "lieu lands" had been patented in place of lands that the railroad companies had lost by reason of mistake in the Department in allowing settlement upon those lands. The amendment that I offer confirms the title to those lands that have been patented to railroad companies where they have lost other lands by reason of mistake committed in the Department. That will cover the point upon which my colleague based his argument yesterday.

This was followed by a statement of Mr. Andrews, a member from Nebraska, as follows (p. 1938):

Mr. ANDREWS. Mr. Speaker, the pending amendment affects title to about 201,000 acres of lieu lands in the State of Nebraska. If there should be any disturbance of the titles held upon those lands the whole matter could be carried back to affect injuriously an equal amount of land in another portion of the State, and thus involve the interests of settlers on over 400,000 acres of land in the State of Nebraska. About 201,000 acres of land were accepted by a certain grantee, in lieu of other lands to which that grantee was entitled in the South Platte country. The lands accepted in the North Platte country, in the State of Nebraska, were, in some instances, less valuable than those in the South Platte country. Nevertheless, the grantee accepted these lieu lands rather than disturb the settlers who had filed homestead and

other entries upon South Platte lands properly included in the grant to which I have referred.

Mr. LACEY. May I ask the gentleman a question right there?

Mr. ANDREWS. Certainly.

Mr. LACEY. I should like to ask him whether he deems it important for the interests of this large number of settlers in the great tract of public lands in his district that this bill should go through confirming these titles so as to protect them?

Mr. ANDREWS. I do, Mr. Speaker, and I earnestly hope that the amendment proposed by the chairman of the committee will prevail.

SPECIFICATION OF ERROR.

The assignment of errors in the record (R. 37) presents in various forms but one, namely:

Error in holding that this suit is for a recovery of lands that were "patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry," within the meaning of the proviso to section 1 of the Limitation Act of 1896 (29 Stat. 42).

Our contention is that this is not such a suit, because,

1. The Dakota lands which formed the basis of the Montana selections for which recovery is sought

were not lost or relinquished in consequence of any failure to withdraw them from sale or entry, but were conveyed in exchange for those selections under the grant of 1892.

2. The proviso to section 1 of the Limitation Act of 1896 was only intended to prohibit suits to annul certificates or patents on the ground that they conveyed lands outside the granted limits under the special circumstances stated.

ARGUMENT.

I.

The Dakota Lands which Formed the Basis of the Montana Selections for which Recovery is Sought were Not Lost or Relinquished in Consequence of Any Failure to Withdraw Them from Sale or Entry, but Were Conveyed in Exchange for Those Selections under the Grant of 1892.

The Act of 1892 granted to the Company nonmineral lands to be selected in exchange for an equal quantity of lands which the Company owned under a prior grant and which it agreed to and did reconvey to the United States in consideration of the new grant.

Viewing the language of the proviso to section 1 of the Limitation Act of 1896 in its broadest sense, it may be said that the lands in question were "patented in lieu of other lands covered by a grant which were * * * relinquished by the grantee." That is, certain Dakota lands covered by the grant

of 1857 were conveyed to the United States by the Company in exchange for the lieu selections in Montana embraced in this patent. But it can hardly be said that the Dakota lands " were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry." The Dakota lands certainly were not " lost." On the contrary, title to them was established by the decision in the *Phelps Case*, 137 U. S. 528. They were " relinquished," it may be, in the sense that a conveyance may be said to be a relinquishment, but not " in consequence of the failure of the Government or its officers to withdraw the same from sale or entry." They were conveyed *in consequence of the offer of lieu lands made in the Act of 1892*, and in consideration of that offer. The Government officers did indeed fail to withdraw the Dakota lands covered by the Act of 1857, because of their erroneous construction of the grant, but the reconveyance, or relinquishment, of those lands under the Act of 1892 was in pursuance of an authorized exchange agreement between the Government and the Company, not in consequence of any failure to withdraw them from sale or entry.

If no exchange agreement had been negotiated between the Government and the Company, if the Act of 1892 had not been passed and accepted, and if the Company had relinquished its Dakota lands

to settlers and received a patent for lieu lands in Montana without the authority of a new grant, we would then have the case of a patent issued under the circumstances stated in the proviso, but not otherwise.

II.

The Proviso to Section 1 of the Limitation Act of 1896 was only Intended to Prohibit Suits to Annul Certificates or Patents on the Ground that they Conveyed Lands outside the Granted Limits under the Special Circumstances Stated.

Without the Act of 1892 a patent for any lieu lands outside the original grant would have been without authority and void, irrespective of the character of the lands as mineral or nonmineral. Certificates or patents of that kind had been issued, without the authority of any grant, where granted lands had been lost or relinquished to settlers in consequence of the failure of the Land Department to withdraw them from sale or entry, and it was precisely to protect such certificates or patents, and such only, against suits founded upon such want of authority, that the proviso under consideration was enacted. This is manifested by the legislative history of the proviso.

Throughout the entire legislative proceeding it is quite apparent that there was no thought in the mind of any member of Congress that the proviso offered by the chairman of the committee would confirm any certificate or patent procured by fraud,

or any erroneous certificate or patent except such as was issued under the particular circumstances stated. Mr. Hepburn offered an amendment (pp. 1905, 1937) calculated to confirm all erroneous certificates or patents issued without fraud. This was opposed by the chairman of the committee, Mr. Lacey. who, while agreeing that fraudulent certificates or patents should in no case be confirmed, further insisted upon his amendment as confining the confirmation of erroneous certificates or patents to such as were issued under special circumstances like those arising in the case of the Burlington and Missouri River Railroad Company in Nebraska (28 Cong. Rec., pp. 1905–1906, 1937–1938). And the position of the chairman prevailed with the adoption of his amendment incorporating the proviso as enacted (p. 1938). In the Senate the bill was passed five days later upon a unanimous informal report of the Committee on Public Lands without discussion of the proviso[1] (p. 2067).

We are not unmindful of the fact that debates in Congress are not always regarded as a reliable source of information. We do not question the rule that the views of individual members of Congress are not to be taken as expressing the will of that body. And we are aware of the indisposition of the court to go beyond the reports of the committees in search of the true interpretation of an Act. But

[1] For convenient reference the entire proceedings in Congress relating to the proviso are printed in the appendix.

in this case it is shown by public documents, outside of the debates, that the situation as it existed was there fairly presented. We have referred to the introduction of the proviso to meet that situation by the gentleman who as chairman of the committee had charge of the bill, and to the remarks made in explanation of the scope and purpose of the proviso, because the situation itself first arose on the floor of the House and the committee report was silent upon it. And we invoke the rule that the meaning of a statute framed in general language is to be found in the evil which it is designed to remedy. "For this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body." *Holy Trinity Church* v. *United States*, 143 U. S. 457, 463.

Statements made on the floor of Congress by a committee chairman in charge of a bill as to its scope and purpose have been referred to even where the report of the committee covered the subject. *Binns* v. *United States*, 194 U. S. 486, 495. And proceedings on the floor have been referred to as showing what Congress had in mind when it made changes in a bill in the course of its passage. *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 21; *The Five Percent Discount Cases*, 243 U. S. 97, 107.

We are very far from conceding that this suit is within the plain letter of the prohibitory clause. It prohibits a suit to recover lieu lands where the

base lands were "lost or relinquished" in consequence of a failure " to withdraw the same from sale or entry." We maintain that this suit is to recover lieu lands where the base lands were conveyed in consequence of an exchange agreement between Congress and the Company, not lost or relinquished in consequence of a failure to withdraw them from sale or entry. But if the suit were within the letter it would yet not be within the spirit and true intent of the law. In the well known case of *Holy Trinity Church* v. *United States,* 143 U. S. 457, 459, the court through Mr. Justice Brewer said:

> It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.

See also *American Security Co.* v. *District of Columbia,* 224 U. S. 491, 495.

In the present case lieu lands were granted in the Act of August 5, 1892, in exchange for lands which the Company owned under a prior grant, and, in the lieu land grant, mineral lands were excepted. This reservation of mineral lands was inserted in the Act of 1892 in pursuance of a long settled national policy. Yet it has been decided in effect by the courts below that Congress intended to reverse that policy by repealing the mineral exception in a particular instance without any consideration of the policy in general or of the case in particular and without using language directed to that result.

The patent involved in this case was issued June 24, 1907 (R. 5), more than eleven years after the approval of the Act of March 2, 1896, which contains the prohibitory clause. The decision of the lower courts is that Congress intended to confirm every such patent thereafter to be issued immediately upon its issuance, regardless of what reserved lands it might purport to convey and no matter by what outrageous fraud or palpable inadvertence it might have been secured, and this notwithstanding the main purpose of the Act of 1896 was to extend the time for bringing suits to cancel such patents.

This suit is founded on fraud of the Company in obtaining the patent and inadvertence of the Government officials in issuing it. The effect of the decisions below is that Congress intended to place a premium on fraud and mistake and invite their recurrence in the future, to the end that the Gov-

ernment might be deprived of its reserved lands with impunity, and this notwithstanding every circumstance attending the passage of the Act of 1896 discloses the anxiety of Congress to protect the Government against fraud and mistake.

No claim of any bona fide purchaser is involved in this case. The result of the decisions below is that Congress intended to legalize and confirm fraud and mistake, future as well as past, not for the protection of any bona fide purchaser but solely to benefit this particular railroad company, whose situation had already been fully dealt with by the special Act of 1892 and was not then under consideration, and this notwithstanding the statute which has been held to accomplish that result, "in every line of it, from the beginning to the end, was drawn with special reference to the protection of the rights of bona fide purchasers." (Statement of the committee chairman, in charge of the bill and proponent of the proviso in question, in explanation of its scope and purpose. 28 Cong. Rec., p. 1906; *supra*, p. 11; appendix, p. xxi.)

A consideration of consequences such as those we have mentioned which would result from holding that this suit is prohibited by the clause in question makes it unreasonable to believe that Congress intended to include it within the broad meaning of the language used. On the other hand, a rational interpretation of this prohibitory clause

is that it forbids suits to recover lands erroneously certified or patented under the circumstances stated in it and on the ground that the certification or patent was erroneous because of such circumstances. This interpretation gives reasonable effect to the langauge used and furnishes a complete remedy for the evil at which the clause was aimed.

CONCLUSION.

It is respectfully submitted that the decrees of the courts below should be reversed and that the cause should be remanded to the District Court for further proceedings according to law.

FRANCIS J. KEARFUL,
Assistant Attorney General.

November, 1917.

APPENDIX.

[Report No. 253. House of Representatives. 54th Congress, 1st Session.]

EXTENDING THE TIME FOR PUBLIC LAND SUITS.

FEBRUARY 4, 1896.—Ordered to be printed and recommitted to the Committee on the Public Lands.

Mr. LACEY, from the Committee on the Public Lands, submitted the following report:

[To accompany H. R. 5474.]

On the 17th day of January, 1896, the President sent to Congress a message in relation to the expiration of the limitation provided in the act of March 3, 1891. Under the act of March 3, 1887 (24 Stat. L., 256), the Interior Department was directed to adjust all the various railway and other land grants as speedily as practicable, and whenever it was ascertained that lands had been erroneously patented, the law provided that actions should be brought to cancel the same.

Provisions are embraced in the act of 1887 to protect settlers and purchasers by giving them preferential rights in case of the cancellation of their patents.

These proceedings of necessity caused much disturbance among land titles, and although the purpose involved was the laudable one of protecting the Government by correcting mistakes and overturning fraudulent patents, a sense of insecurity and loss of confidence in the integrity of patent titles became a serious drawback to the settlement and improvement of some parts of the country.

In order that all these questions might be speedily adjusted, and that any proposed litigation for the purpose of annulling patent titles should be promptly brought, the limitation act of 1891 was passed, requiring that all such suits as to patents already issued should be commenced within five years, or prior to March 3, 1896, and that as to patents sub-

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sequently issued, suits to cancel the same should be brought within six years after the date of the patent.

The Commissioner of the Land Office on the 18th of December, 1895, addressed a communication to the Secretary of the Interior, suggesting an extension of time by amendment to the act of 1891. The Secretary of the Interior communicated with the President upon the subject, recommending the repeal of the limitation altogether. Thereupon the President sent a message on the subject to Congress, asking for a repeal of section 8 of the act of March 3, 1891.

We will set out in an appendix to this report the message and other communications above referred to.

The Committee on the Public Lands have patiently examined the whole subject and invited before them all persons interested in the question, as also the Assistant Attorney-General for the Department of the Interior and the Commissioner of the General Land Office.

There has been a large variety of land grants which will be affected by the proposed extension of the limitation. The Commissioner of the General Land Office was of the opinion that it would require ten years more to adjust the grant under the act of 1887, and therefore thought the limitation should be extended ten years.

In the adjustment of these grants it is not practicable for more than from two to four clerks in the General Land Office to work at one time without having duplicates made of certain lists or records. With this small force the adjustment has slowly proceeded for the last nine years, and over 60,000,000 acres still remain unadjusted. It appears, however, that by active diligence about 12,000,000 acres have been adjusted in the last year. At this rate the work could be completed in five years more.

But even if it could not be done with the present force, the committee are of the opinion that duplicate copies of lists and documents or records ought to be made to expedite this work, and that the time ought not to be extended more than five years.

While it is important that the rights of the Government should be cared for, and that a reasonable time for adjustment of these patented grants should be given, it is also of

the highest importance that the validity of the Government patents should be examined as speedily as practicable so that former settlers and those who wish to become settlers or purchasers of these lands may know that the Government patent issued by the highest authority of the nation shall be evidence of a final and complete character that the Government's title has been lawfully transferred.

Under existing law, and in the absence of any limitation, a settler may buy a home upon one of these grants, and after occupying it for years, under the faith of a patent regularly issued and recorded, find himself made a party to a long, vexatious, and expensive litigation, and in the end be permitted to buy the land again from the Government or to enter it under the homestead laws.

That such a thing may occur for a reasonable time is perhaps the necessary consequence of fraud and mistake in patents, but that such a condition should be kept open without limit is an intolerable blemish upon the titles purporting to come from the Government. If a private individual sells and conveys lands, and they pass into innocent hands, the purchaser is protected as against his grantor, and time will protect him against all comers. But as against the United States, in the absence of a limitation law he is never secure, and may be subjected to annoyance and expense and possible loss of his land at any time.

A private individual may have obtained a patent for a homestead, tree claim, or preemption claim, and after selling the same the purchaser who has bought upon the faith of the Government patent may be harassed by proceedings in the courts hundreds of miles away, with a possible appeal to the expensive forms of the court of appeals, and the still more expensive and clogged tribunals of the United States Supreme Court.

To remedy these defects, the act of 1891 was enacted. On account of the large land grants involved, and the fact that it has not been found practicable to adjust them within so short a time, we think that a bill giving five years' longer limitation ought to pass, but we do not believe that this extension of time ought to affect bona fide purchasers; that as to them the limitation of the act of 1891 ought to operate as a final bar when the time first limited shall expire.

But as to the original patentees, no great injustice will be done to them by extending the time five years longer, and within that time we think that the grants can be all adjusted. The shortness of this time, it is true, may put the Interior Department to some inconvenience, and it may involve some extra expense for clerical work, but the importance of bringing to an end all disputes upon the part of the Government as against its own patent titles is so evident as to need but little argument in its support.

Your committee have prepared and presented a bill which will carry out the purposes outlined in this report, and we recommend its passage.

We can not agree with the President that public policy requires that there should be no limitation as against the Government in these cases.

We have had unpleasant object lessons in many of the Spanish grants, whose limits are as elastic and uncertain as the Venezuelan boundary. The presence of these disputed titles has cast a blight over some of our most beautiful lands for more than a generation. There should be some time fixed when such a condition shall cease to exist.

The limitation may perfect titles in some instances founded in more or less of fraud or mistake. So it happens with all such statutes, but universal experience has demonstrated the necessity of such statutes.

Most of the States of the Union have adopted statutes which will bind the States themselves. Such statutes have been found to work well. To require the sovereign power to proceed in a reasonable time if it wishes to avoid or nullify its own acts is a just provision in behalf of its individual citizens. The absence of limitation excuses delays on the part of officials, and that which may be done at any time, however distant in the future, is much less likely to be attended to in the present.

We are informed that as to some of these land grants the greater part that has been patented has been sold to third persons. That was the very purpose of the land grants. It was not intended that these grants in aid of public improvements should be tied up indefinitely and withheld from settlement.

It was the theory of the projectors of such enterprises that these lands would be brought into markets by the building of railways and that the railway companies would be interested in selling them on long time at low prices and at low rates of interest to actual settlers who would furnish a carrying business for the new lines. It ought not to be the policy of the Government to harass or annoy one of these settlers by any litigation whatever.

The policy of making railway grants has been long since abandoned. The adjustment of those made should proceed with all reasonable speed, so that the transactions may be closed.

The railway companies themselves have encouraged delay by failing to procure their patents, in order to avoid local taxation. One of the purposes of the act of 1891 was to encourage the patenting of such lands, so that they might become subject to such taxation, and that their sale and settlement might be encouraged.

The bill which the committee presents with this report is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a special grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within ten years after the date of the issuance of such patents. But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed.

SEC. 2. That if any person claiming to be a bona fide purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a bona fide purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons, for whose benefit the certification was made, for the value of said land, which in no case shall be less than minimum Government price thereof, nor more than the amount paid by the purchaser to the original grantee of the United States, and the title of such claimant shall stand confirmed. An adverse decision by the Secretary of the Interior on the bona fides of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a bona fide purchaser, but who has not sub-

mitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a bona fide purchaser, the court shall decree a confirmation of the title, and shall render a decree in behalf of the United States for the value of the land as hereinbefore provided. Any bona fide purchaser of lands patented or certified to a railroad company, and who is not made a party of such suit (and who has not submitted his claim to the Secretary of the Interior), may establish his right as such bona fide purchaser in any United States court having jurisdiction of the subject-matter, or at his option as prescribed in sections three and four of chapter three-hundred and seventy-six of the acts of the second session of the Forty-ninth Congress.

SEC. 3. If at any time prior to the institution of suit by the Attorney-General to cancel any patent or certification of lands erroneously patented or certified, a claim or statement is presented to the Secretary of the Interior by or on behalf of any person or persons, corporation or corporations, claiming that such person or persons, corporation or corporations, is a bona fide purchaser, or are bona fide purchasers of any patented or certified land, by deed, or contract, or otherwise from or through the original patentee or corporation to which patent or certification was issued, no suit or action shall be brought to cancel or annul the patent or certification for said land until such claim is investigated in said Department of the Interior; and if it shall appear that such person or corporation is a bona fide purchaser as aforesaid, or that such persons or corporations are such bona fide purchasers, then no such suit shall be instituted, and the title of such claimant or claimants shall stand confirmed; but the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons, for whose benefit the patent was issued or certification was made, for the value of the land as hereinbefore specified.

VIEWS OF THE MINORITY.

The undersigned, members of the Committee on the Public Lands, think that the Government should not be prevented from initiating proceedings to correct the fraud or errors of its agents or grantees, by which much of the public domain may be passed to corporations and syndicates. We propose the following substitute for the bill reported by the committee.

THOS. C. MCRAE.
O. W. UNDERWOOD.

A BILL To repeal section eight of an act entitled "An act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety one.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section eight of an act entitled "An act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one; the act entitled "An act to amend section eight of an act approved March third, eighteen hundred and ninety-one, entitled 'An act to repeal timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one," and the act entitled "An act to extend the provisions of section eight of the act entitled 'An act to repeal timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, concerning prosecutions for cutting timber on public lands, to Wyoming, New Mexico, and Arizona," approved February thirteenth, eighteen hundred and ninety-three, be, and the same are hereby, repealed.

APPENDIX.

We here set out the President's message and the departmental correspondence upon which it was based:

[House Doc. No. 151, Fifty-fourth Congress, first session.]

MESSAGE OF THE PRESIDENT OF THE UNITED STATES.

To the Congress:

I desire to invite attention to the necessity for prompt legislation in order to remove the limitation of the time within which suits may be brought by the Government to annul unlawful or unauthorized grants of public lands.

By the act of March 3, 1887 (24 Stats., 556), the Secretary of the Interior is directed to adjust each of the railroad land grants which may be unadjusted, and it is provided if it shall appear, upon the completion of such adjustment, or sooner, that the lands have been from any cause erroneously certified or patented by the United States to or for the use of a company claiming under any of said grants, it shall be the duty of the Secretary of the Interior to demand a reconveyance of the title to all lands so erroneously certified or patented, and on failure of the company to make such reconveyance within ninety days the Attorney-General is required to institute and prosecute in the proper courts necessary proceedings to restore title to said lands to the United States. The demands made under this act have been numerous, and in some cases have resulted in the reinvestment

of title to the lands in the United States upon demand, but in most cases the demand has been refused and suits have been necessary.

The work of adjustment has been unavoidably slow. The said act makes provision for the reinstatement of entries erroneously canceled on account of railroad withdrawals, and, upon certain conditions, provides for the confirmation of titles derived by purchase from the companies of lands shown to be excepted from the grants. It contemplates a disposition of every tract, described by the granting act, situated within the primary or granted limits; an inspection of each tract certified or patented to the company within such limit, to determine whether such certification or patenting was proper; the listing of those tracts shown to be erroneously certified, and the determination for what tracts lost to the grant indemnity is to be allowed.

It is necessary, in making such an adjustment, that all questions of conflicting claims, either between settlers and the road, or between two roads, the grants for which conflict or overlap, be finally disposed of, so that a proper disposition of the land can be shown in the adjustment. While adjustments have proceeded with the utmost rapidity consistent with a due regard for the rights of the settlers, of the United States, and the railroad companies, and while to this end the force of adjusters has been largely augmented in the General Land Office, many of the grants yet remain unadjusted.

In some of the grants, notably the corporation grants, the lack of surveys up to the present time made the completion of the work impossible.

Decisions rendered by the Interior Department in numerous conflicts have been carried into the courts. The construction of the Interior Department has generally been sustained when final determination has been reached, but many of the cases are still pending in the courts, not yet having been decided. Some of these cases, while involving immediately the title to only one particular tract, will, when decided, furnish a rule of construction to control the disposition of the title to thousands of acres of other lands in the same situation. Until the courts pass upon these questions final adjustments can not be made.

By section 8 of the act of March 3, 1891 (26 Stats., 1099), it is expressly enacted that suits by the United States to vacate and annul any patent theretofore issued "shall only be brought within five years from the passage of this act." This period of five years will expire on the 3d of March, 1896. Of course no suit by the United States to secure the cancellation of a patent in this class of cases after that date would be effective. Indeed, it is now too late to initiate proceedings looking to any such suit, inasmuch as demand has to be first made on the company, and thereafter ninety days must be allowed for compliance or refusal, in accordance with the provisions of the act of March 3, 1887. Before the expiration of this period the statute would bar the right of recovery by the Government, and the benefits of anticipated favorable decisions of the courts would be lost

so far as they might determine the character and disposition of grants similar to those directly involved in pending cases.

It will be readily seen that if this act of limitations is to remain on the statute books, the portion of the adjustment act referred to would be rendered nugatory. Indeed, there would be but little use in continuing the adjustment of many of the land grants, inasmuch as ascertained rights of the United States, or of settlers, could not be enforced by law.

Legislation establishing limitations against the right of the Government to sue is an innovation not entirely consistent with the general history of the rights of the Government, for it has uniformly been held that time did not bar the sovereign power from the assertion of a right.

The early adjudications of the Land Department construed the grants with a degree of liberality toward the grantees, which later decisions of the courts and of the Department have not sustained. It seems clear that the further progress of adjustments will develop facts and transactions in connection with these land grants which ought to be the subjects of legal examination and scrutiny before they are allowed to become final and conclusive. The Government should not be prevented from going into the courts to right wrongs perpetrated by its agents or any other parties, and by which much of the public domain may be diverted from the people at large to corporate uses.

In these circumstances, it seems to me that the act of 1891 should be so amended as not to apply to suits brought to recover title to lands certified or patented on account of railroad or other grants. And I respectfully urge upon Congress speedy action to the end suggested, so that the adjustment of these grants may proceed without the interposition of a bar, through lapse of time, against the right of recovery by the Government in proper cases.

GROVER CLEVELAND.

EXECUTIVE MANSION, *January 17, 1896.*

DEPARTMENT OF THE INTERIOR,
Washington, December 27, 1895.

SIR: I beg leave to invite your attention to the provisions of section 8 of the act of March 3, 1891 (26 Stat., 1099), where it is enacted that suits by the United States to vacate and annul any patents theretofore issued, "shall only be brought within five years from the passage of this act," which, in my opinion and that of the Commissioner of the General Land Office, ought to be repealed. In order that you may fully understand the situation, I beg to submit the following observations:

By the act of March 3, 1887 (24 Stat., 556), the Secretary of the Interior is directed to adjust each of the railroad land grants which

may be unadjusted; and it is provided if it shall appear, upon the completion of such adjustment, or sooner, that lands have been from any cause erroneously certified or patented by the United States to or for the use of a company claiming under any of said grants, it shall be the duty of the Secretary of the Interior to demand a reconveyance of the title to all lands so erroneously certified or patented; and on failure of the company to make such reconveyance within ninety days, the Attorney-General is required to institute and prosecute, in the proper courts, necessary proceedings to restore title to said lands to the United States.

The said act also makes provision for the reinstatement of entries erroneously canceled on account of railroad withdrawals, and, upon certain conditions, for the confirmation of titles derived by purchase of the companies of lands shown to be excepted from the grants.

The demands made under this act have been numerous, and in some cases have resulted in the reinvestment of title to the land in the United States; but in most cases the demand has been refused, or no response made thereto, and suits have been necessary.

The work of adjustment contemplates a disposition of every tract, described by the granting act, situated within the primary or granted limits; an inspection of each tract certified or patented to the company within such limit, to determine whether such certification or patenting was proper; the listing of those tracts shown to be erroneously certified; and the determination for what tracts lost to the grant indemnity is allowable.

It is necessary, in making such an adjustment, that all questions of conflicting claims, either between settlers and the road or between two roads, the grants for which conflict or overlap, be finally disposed of, so that a proper disposition of the land can be shown in the adjustment.

In some of the grants, notably the corporation grants, the lack of surveys renders an immediate adjustment impossible.

Decisions have been made by this Department in the matter of numerous conflicts and the cases have been carried into the courts.

So far as the same have reached final determination they have generally been favorable to the construction of this Department, but many are still pending in the courts.

Under the provisions of the act of March 3, 1887 (supra), the adjustment of the railroad land grants has proceeded with the utmost rapidity consistent with a due regard for the rights of the settlers, of the United States, and the railroad companies. To this end the force of adjusters has been largely augmented in the General Land Office; and when deemed advantageous, the hours of work have been prolonged even until late at night. And when any such adjustment has been submitted to the Secretary for consideration and approval, as is required in every instance, prompt action has always been taken, such work being treated as "special."

Notwithstanding these extraordinary efforts, many of the grants yet remain unadjusted, though much and very rapid progress has been made. But from the nature of the many difficulties and complications connected with the work, the recital of which would occupy too much space herein, it has been, and is, both a moral and physical impossibility to close the adjustment of these grants as speedily as desired. Some of the cases now pending in the courts involve actually the title to only one particular tract, while a decision upon the questions therein would control the disposition of the title to thousands of acres of other lands in the same category.

When these important matters will be decided it is almost impossible to say, but certainly not before March 3, 1896. Should these questions be decided favorable to the Government, the favorable decision could not necessarily be made to inure to its benefit, as to the other lands, the title to which was not by actual description embraced in said decision, because, by section 8 of the act of March 3, 1891 (26 Stat., 1099), it is expressly enacted that suits by the United States to vacate and annul any patent theretofore issued "shall only be brought within five years from the passage of this act." This period of five years will expire on the 3d of March, 1896.

Of course, no suit by the United States to secure the cancellation of a patent in this class of cases, after that date, would amount to anything. Indeed, it is now too late to initiate proceedings looking to any such suit, inasmuch as demand has to be first made on the company, and thereafter ninety days must be allowed for compliance or refusal in accordance with the provisions of the act of March 3, 1887 (supra). Before the expiration of which time the statute would bar the right of recovery by the Government.

Recent decisions of the Supreme Court have greatly affected the previous dispositions made under railroad grants, but will facilitate the progress of the adjustment of grants, notably, Northern Pacific Railroad Company *v.* Bardon (154 U. S., 288); Northern Pacific Railroad Company *v.* Bardon (145 U. S., 535); Whitney *v.* Taylor (158 U. S., 85), and United States *v.* St. Paul and Sioux City Railroad (159 U. S. 349).

It will be readily seen that if this act of limitations is to remain on the statute books the portion of the adjustment act of 1887, before cited, would be rendered nugatory. Indeed, there would be but little use in continuing the adjustment of many of the land grants, inasmuch as ascertained rights of the United States, or of settlers, could not be enforced by power of law. By this denial to the Government of the right to go into court and ascertain its rights the railroad companies would profit very largely, as it is a well-known fact, capable of abundant substantiation by the records of the Land Office, that the early adjudications of the Land Department construed the grants with a degree of liberality toward the grantees, which, by later decisions, is declared not to have been warranted by law.

Should, therefore, the statute of limitations make them secure in the enjoyment of the lands thus obtained, it is entirely inconsistent with experience to suppose for a moment they would, on an impotent demand, voluntarily surrender anything that the law secures them the enjoyment of.

It is submitted, with due respect, that the legislation of Congress establishing this limitation against the Government is an innovation utterly inconsistent, in my opinion, with the theory of our institutions, and seems likely to result almost entirely in benefiting the interests of the corporations and adversely to those of the Government. From time immemorial it has been held that limitations did not bar the sovereign power from the assertion of a right. And in this country the highest judicial tribunals have uniformly held that laches was not to be imputed to the Government, which could only act through its agents. But in this matter the Government is barred from righting the wrongs, whether intentional or inadvertent, perpetrated by those agents against the people at large, by which much of the public property has been perverted to corporate uses.

Statutes of limitations are regarded favorably because of the repose they give against stale claims—the presumption being that after the lapse of a reasonable time they have been asserted and adjusted or waived.

But this presumption does not arise where, from circumstances, no proper opportunity has been afforded for the assertion of the claims; as, for instance, during the existence of the disabilities of minority, coverture, or the like. And certainly such presumption can not arise in the matter of these land grants, where, as is abundantly shown, from the very nature of the case the rights of the Government are ascertainable with so much difficulty.

Under these circumstances it seems to me that the act of 1891 should be so amended as not to apply to suits brought to recover title to lands certified or patented on account of railroad or other grants. And I respectfully request that you urge upon Congress to take speedy action, as suggested, that there may be no delay in the adjustment of these grants and no bar, by lapse of time, against the right of recovery by the Government in a proper case.

Herewith is transmitted copy of the letter of the Commissioner of the General Land Office to me on this subject. Your attention is invited to the fact that in recommending the repeal of the existing law he suggests the reenactment of limiations of ten years within which suits are to be brought to secure cancellation of patents. I do not entirely concur in this suggestion of the Commissioner, but think, for reasons herein stated, it would be best to repeal the limitations absolutely, and leave the law as it existed prior to the passage of said act of March 3, 1891.

Very respectfully,

HOKE SMITH, *Secretary.*

The PRESIDENT.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 18, 1895.

SIR: On March 3, 1891, an act of Congress entitled "An act to repeal the timber-culture laws, and for other purposes," was approved by the President. (26 Stat., 1095.) Section 8 of said act provided, among other things, "that suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issue of such patents." And by another act, approved the same day (26 Stat., 1093), entitled "An act to amend section 8 of an act approved March 3, 1891, entitled 'An act to repeal timber-culture laws and for other purposes,'" the same proviso was enacted. It will be observed that this section makes no exception, but applies to all patents.

By act of March 3, 1887 (24 Stat., 256), directions were given for the adjustment of all grants by Congress to aid in the construction of railroads, and for the recovery by the United States of title to lands which from any cause have been erroneously certified or patented under such grants, and said act requires that the adjustments be made in accordance with the rulings of the United States Supreme Court. Therefore, as conveyances under these grants date as far back as 1850 and were made under various court and departmental rulings, it is not surprising that many of said conveyances have been and will be found, under the construction now given such grants by the Supreme Court, to have been erroneous.

A number of these grants have been examined with a view to their adjustment, and rules have been laid to show cause why suits should not be instituted for recovery of title in some cases, and demands for reconveyance have been made in others, but very few have been finally adjusted and closed, not more than a dozen; and most of these examinations, nearly all in fact, were made prior to the rulings of the United States Supreme Court in the cases of Mary Bardon *v.* Northern Pacific Railroad (145 U. S., 535) and Whitney *v.* Taylor (158 U. S., 85), which so change the previous rulings of the court, as construed by this Department, as to make necessary a reexamination of all railroad land grants, excepting the few finally closed and some half dozen examined since the decision in the case of Whitney *v.* Taylor, above referred to. The Department so held in its letters of July 18, 1895, in the case of the St. Louis, Iron Mountain and Southern Railway Company, and September 5, 1895, in the case of the Burlington and Missouri River Railroad Company of Iowa.

There are 79 land-grant railroads and 7 land-grant wagon roads.

Under the provisions of section 8 of the act of March 3, 1891, as originally passed and amended as aforesaid, the time within which the United States can legally bring suit for the recovery of lands erroneously patented prior to March 3, 1891, will expire March 3, 1896, unless an extension be made by Congress.

The work of adjusting these grants is one of great magnitude, and the division of the office charged with its execution is also charged with the consideration and determination of all questions relating to or arising out of conflicts between grants by Congress to aid in the construction of railroads, wagon roads, canals, and river improvements, and rights of way over the public lands for railroads, canals, ditches, and reservoirs, and its current work must be kept up. It is also charged with the administration of the grant of desert lands to certain States.

It is clear, therefore, that the time within which the United States may bring suit for the recovery of land erroneously certified or patented under these grants must be extended or that the interests of the Government, and in many instances those of private citizens, must suffer. I have accordingly the honor to suggest that Congress be asked to extend such time ten years, or until March 3, 1906, for lands patented prior to March 3, 1891, and ten years from date of patent for lands patented subsequent thereto.

Very respectfully,

S. W. LAMOREUX, *Commissioner.*

The SECRETARY OF THE INTERIOR.

EXTRACTS FROM THE CONGRESSIONAL RECORD.

Mr. HEPBURN. I move to amend section 1 of the bill by adding:

Provided, That all lands patented or certified to any State, corporation, or individual, under the rulings or constructions of law of the Commissioner of the General Land Office, or the Secretary of the Interior, at the time of the issuance of said patents or certificates, and when no fraud has been committed by the agent of the State or corporation or by the individual, shall be excepted from the operation of the provisions of this act as to extension of time and bringing of suits, and of the act approved March 3, 1887, entitled "An Act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes."

Mr. Speaker, in the district in which I live there are at least 200,000 acres of land granted to the State of Iowa, to aid in the construction of railroads, nearly forty years ago. This land grant was adjusted and the certification made in 1859. Thirty-seven years have elapsed since the corporation taking under this grant from the State became the owner of these lands. Every acre of this land was sold many years ago, and is now in the hands of settlers—of farmers. In my judgment this bill, notwithstanding the opinions that have been presented here by some gentlemen, does disturb this class and throws a cloud upon every one of these titles.

It is true that there is a clause in this bill whereby at the end of litigation or by filing evidence of the title of the new holder he may not be seriously disturbed. But no one of all those settlers knows what particular tract of land will be selected by the Secretary of the Interior under the act of 1857 as the subject of litigation. Every man's land is clouded with the thought, with the certainty, that the Secretary of the Interior may institute a suit against him. He may be conscious of his ability to defend himself, but he

does not want to go to a Federal court, possibly 100 or more miles away, into a community in which he is a stranger, and there make his defense. He can not do it without incurring expense.

Now, Mr. Speaker, this is a matter of importance. Only a week ago one of my clients wrote me that, under the act of 1887, although he had his certificate, his duplicate—which under the laws of the State of Iowa is all the evidence of title that he needs—although he has held that for more than forty years, he has recently been notified by the Department that under the readjustment of that Department, going over the old entries, they have discovered that his land was within the limits of a railroad, and was double-minimum rather than single-minimum land. On those lands he had located a Mexican land warrant, paying the difference for the fractional quarter. He was notified of the annulment of his patent, and required to pay the additional sum that would make the aggregate of the double-minimum price, after forty years. I say that is not right, and that there ought to be a statute of limitations that would be a bar against the Government as against individuals.

There is no reason why the officers may be negligent for forty years and then at the end of that time come upon a purchaser, as in this case, not the original purchaser, and require the new owner to make this payment. The other man is dead and gone long ago and his estate has been settled, so there is no possible redress for the present holder. It is not right or proper.

The gentleman from Arkansas [Mr. McRae], in a speech that he made to this House the other day, told the House that the statute of 1887—to be continued in its operation by this act—was a statute for the recovery of lands fraudulently obtained from the Government. I have taken occasion to make inquiry, and I find that in all of the adjustments in every case where the company has been required, under the provisions of the act of 1887, to make reconveyance, in not a single instance has there been an allegation of fraud.

These cases do not arise even from any mistake of fact. There is neither mistake of fact nor fraud involved in this. They grow out of the changes of construction by the officers

to-day differing from those of the officers of twenty, thirty, or forty years ago. For instance, years ago the Department held that in case of a fraudulent preemption, or where a preemption had been abandoned, the preemption entry did not serve to extract the land from the operation of the donating statutes. Under that, in cases of that, where the preemption filing had been made, but abandoned, or shown in contest to be fraudulent, the lands were certified to the State, and from the State of Iowa to the railway company. The Department has recently changed that ruling perhaps under a late decision of the Supreme Court, which holds that that kind of an entry did serve the office of extracting those particular lands from the operation of the granting statute.

Although these lands were long ago certified to the company, although they have sold them, now they require the company to reconvey the lands conveyed to them long ago, which requires the holder of those lands to show that he is at present a bona fide holder in order to prevent the institution of suits against him, and in failure of that, requires him to go to a distant court to make defense to show that he is a bona fide holder. I do not believe that there is any justice in that.

The gentleman from Arkansas [Mr. McRae] the other day said in his speech to the House that these certificates were a mere matter of form (substantially he said that), prepared often by the railroad companies; that their office was simply to serve as notice that those particular lands were claimed by the railway company as lying within the grant. The gentleman was certainly mistaken. This form of patent, this method of certification, was authorized by the statute of 1854. They take the place of patents in land grants. The Federal courts have held that they serve every purpose of patents, and of all the grants that have been made to the State of Iowa or to the railroad companies within that State not one acre is to-day held under any other muniment of title than such a certificate as the gentleman told us the other day was a mere formal something intended to serve the purpose of notice.

They were authorized by the statute of 1854. At the time of some of the earlier grants his own State was one of the

grantees under the act of 1849 of the swamp lands lying within her borders, and the State of Illinois was a grantee under that act to aid in the construction of the Illinois Central Railway. It makes them muniments of title. It was found to be an impossibility almost for the old form to be observed and for patents in each individual case to be issued. It was an almost interminable work, and then the act of 1854 was passed, and it has all the effect, so far as taking its title from the Government is concerned, of the most formal patent that ever was issued in the world.

Now, Mr. Speaker, these lands are patented and have been occupied for thirty or forty years. There is no reason or justice why repose should not be given by statute to all of these titles. If we simply allow time to pass, repose will be given to every one of them on the 3d day of next March, and no one of these settlers can be disturbed. In some of the proposed suits, I learned from the district attorney of the district in which I live, it will be necessary in carrying out the provisions of the act of 1887 to make 2,000 people defendants to these suits. Two thousand people! In these particular cases, when it is all done, what boots it to the Government? It is a conflict between the beneficiaries of two grants.

The Government granted land to the State for swamp-land purposes, and the Government granted land to the State for railroad purposes. There was a conflict between the company and certain counties, who were in their turn grantees, as to who was the owner. These disputes were all composed twenty or twenty-five years ago by compromises and concessions, the one or the other party quitclaiming as to the other. The Government has no title of any kind. It is a conflict that they are proposing to carry on with reference to grants, and when this is all settled, at an expense of infinite litigation, not an acre goes to the Government. Why, then, should we not give repose in this class of cases?

In another instance that I am familiar with, Mr. Speaker, in your own State [Mr. Mercer in the chair], there was a grant to a company when practically, by an error or an oversight on the part of the officers of the United States, the lands lying on the line on either side of the file plat of the road were not withdrawn from market for a considerable

period. Settlers came in and took these lands. Later, when the railroad was constructed, it was found that there was not within the limits of the grant a sufficient quantity to meet the purposes of the grant. The Department held that lieu lands might be given—lands in another locality—and the company was compelled to go away beyond its grant to lands that did not have the benefit of the construction of this road and take 201,000 acres, and one block of 10,000 acres of it they sold for $2,500—25 cents an acre; but they took these lands under the then ruling of the Department.

Under the advice of the law officers of the Department, subsequently the Department changed its view. When this was done men of eminence held the position. The lists were not made by railroad attorneys. Some of the lists of which I am speaking bore the signature of Thomas A. Hendricks, the then Commissioner of the General Land Office. He was not a man who transacted his business in the loose way characterized by the gentleman from Arkansas. He was certainly mistaken in the statement that he made that that ruling was adhered to until quite recently. Then they changed the ruling and held that lands must be taken within the prescribed limits or else the entries and selections were void. Now, one of the suits ordered is to recover the title of these lands taken in lieu of those that the company lost through the failure of the Federal officers to withdraw the lands from market.

I am not prepared to say that successful tests might not have been made, but they elected to take the other course and leave the settlers in quiet occupation. Now, sir, these lands in turn are settled. They are not in the hands of corporations, and if my amendment is adopted, every recovery can be had except in cases where the mistake has occurred—if it is a mistake, for I want to say to gentlemen that any lawyer will agree that these are close questions about which men may well differ, though the party in power has said otherwise.

Every acre, I say, will be recovered where a mistake of law, not of fact, a misconstruction of law, an improper ruling, has been made by the officers of the Government, and, in addition to that, where no fraud appears. If there is fraud, notwithstanding the fact that the error was that of

the representatives of the Government, recovery may be had. Now, if there is no question of fact; if there is no fraud; if there is no right save that which is grounded in a charge of ruling or construction, I submit that there is no such equity, no such justice, no such condition of affairs as to justify either the remarks made by the gentleman from Arkansas [Mr. McRae] the other day of the demands that are made by the provisions of this bill. I hope that the amendment which I have offered may prevail.

Mr. LACEY. Mr. Speaker, this bill, in every line of it, from the beginning to the end, was drawn with special reference to the protection of the rights of bona fide purchasers. As to the instance that my colleague cites as having occurred in Nebraska, I propose at the proper time to offer an amendment which I think will cover the points he has in mind. I will send the amendment to the Clerk's desk to be read as a part of my remarks, so that it may appear in the Record for the information of members.

The amendment was read, as follows:

Add at the end of section 1: "*Provided*, That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry."

Mr. HEPBURN. Mr. Speaker, I hope my colleague will not offer that until a vote has been had on my amendment.

Mr. LACEY. I do not propose to offer it at this time. Let me now briefly call the attention of the House to a difficulty in relation to one of the points embraced in the amendment of my colleague, which is this: His amendment provides that where patents have been erroneously issued without fraud they shall be confirmed. Now, these patents were erroneously issued frequently by the mistake in law or fact of a twelve-hundred-dollar clerk, and subsequently the Supreme Court of the United States decided that they were issued through mistake in the construction of the law. Evidently, if any of the lands thus patented to the company, which it does not own and ought not to have, are still held by the company, they ought to be reconveyed.

This bill protects the title where the lands have been sold, but if any of those lands are still in the hands of the company there is no reason why the patentee should not give them back if they have been erroneously patented, even though there was no fraud whatever. The amendment I have suggested will protect the interest of the settlers on these lands and at the same time it will leave the Government the privilege of acquiring again the titles to unsold lands that were erroneously patented.

Mr. McRae. Mr. Speaker, I do not understand that the general debate is closed, or that the amendment of the gentleman from Iowa could be considered at this time. I understand it has only been read for information.

Mr. Lacey. It has only been read for information.

(28 Cong. Rec. Pt. 2, pp. 1905–1906.)

* * * * *

Mr. Hepburn. Mr Speaker, I desire to offer an amendment which I send to the desk.

The amendment was read, as follows:

Add to the first section the following language:

"*Provided*, That all lands patented or certified to any State, corporation, or individual, under the rulings or constructions of law of the Commissioner of the General Land Office or the Secretary of the Interior, at the time of the issuance of said patents or certificates, and when no fraud has been committed by the agent of the State or corporation or by the individual, shall be excepted from the operation of the provisions of this act as to extension of time and bringing of suits, and of the act approved March 3, 1887, entitled 'An Act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes.'"

Mr. Lacey. Mr. Speaker, I move as a substitute for that proposed amendment the amendment which was read in my time yesterday.

The amendment of Mr. Lacey was read, as follows:

Add at the end of section 1: "*Provided*, That no suit shall be brought or maintained, nor shall recovery be had, for lands or the value thereof that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry."

Mr. Lacey. Now, Mr. Speaker, a word of explanation. My colleague [Mr. Hepburn] on yesterday explained that

in Nebraska and in some other localities "lieu lands" had been patented in place of lands that the railroad companies had lost by reason of mistake in the Department in allowing settlement upon those lands. The amendment that I offer confirms the title to those lands that have been thus patented to railroad companies where they have lost other lands by reason of mistake committed in the Department. That will cover the point upon which my colleague based his argument yesterday.

Mr. TAWNEY. May I ask the gentleman a question?

Mr. LACEY. Yes, sir.

Mr. TAWNEY. Your proposed substitute and the amendment of the gentleman from Iowa [Mr. Hepburn] relate solely to "lieu lands."

Mr. LACEY. Certainly.

Mr. TAWNEY. Now, the act of 1887 applies to lands that are known as "in place" lands as well as to "lieu lands."

Mr. LACEY. Certainly.

Mr. TAWNEY. Then why should we except lieu lands and still let the "place" and "indemnity" lands sold to bona fide purchasers remain under the provisions of the act of 1887?

Mr. LACEY. We do nothing of the kind. The bill in express terms already protects the bona fide purchasers of all kinds of lands, "lieu lands," "place lands," or any other kind of lands.

Mr. TAWNEY. It protects them at the end of a lawsuit.

Mr. LACEY. Not at all.

Mr. TAWNEY. It does not protect the bona fide purchaser so as to prevent a suit being brought by the Government against him and thus disturbing his title and the title to a great deal of land in the States where these suits are brought.

Mr. LACEY. That may be. But so it is always with any person. A suit may be brought to attack the title of anybody. But when we frame a bill which perfects the title of these men, which says their title shall be confirmed, and is confirmed, and that if suit be brought it shall be the duty of the court to at once confirm the title, nothing more, certainly, can be done.

But let me call the attention of the House and of my friend who wants light on this subject to the proposed amendment

of my colleague, providing that when a patent has been issued, unless it has been issued by reason of fraud that the title never can be assailed, although the railway company still remains in possession. It is true that by reason of some mistake tracts of land here and there have been certified or patented to railway companies that ought never to have received them, and the bill as we have prepared it will enable the Government to reclaim or recover those lands within the next five years. But if the amendment proposed by my colleague [Mr. Hepburn] be adopted, that is the end of it. Unless you can show that the railway company was guilty of actual fraud, then, although the company may hold hundreds of thousands of acres that ought never to have been patented to it—lands which were patented to it by mistake—those lands can never be recovered. There is no reason why the railway companies should be thus protected and permitted to hold lands which do not properly belong to them. There is reason why the settler should be protected. Whether the land which he purchased from the railroad company actually belonged to it or not, the company had the muniments of title, it had the patent, was clothed with apparent authority to make the conveyance, and the settler has purchased the land, entered upon it, taken possession of it, and improved it. In such cases, no matter how defective the railroad company's title may have been, the settler should be protected.

But while the lands are still in the hands of the company I see no reason why we should be careful to protect their title, if the land was conveyed to them by mistake.

Mr. TAWNEY. The gentleman will concede, will he not, that when a railroad company has sold to bona fide purchasers, those purchasers ought to be protected by the Government?

Mr. LACEY. Certainly. Not only do I concede that, but we have expressly provided in the bill that they shall be protected.

Mr. TAWNEY. Now, when we know, as we do, that the greater part of the lands granted to the railroad companies have passed into the possession of bona fide purchasers, ought we not to take notice of that fact and protect them?

Mr. LACEY. Certainly.

Mr. TAWNEY. But ought we not to protect them against suits being brought by the Government to disturb their title?

Mr. LACEY. I advise my friend to read the bill; he will find that such purchasers are protected by it.

Mr. TAWNEY. Not against suits.

Mr. LACEY. Let me ask the gentleman this question: Why should we give protection against suits and confirm the title in the remainder of the lands which the railroad company has not conveyed and which ought never to have been patented to it?

Mr. TAWNEY. I am not in favor of that proposition. I have here a substitute for the amendment offered by the gentleman's colleague, and in my amendment it is provided expressly that the provisions of this act shall not apply to lands that are sold by a railroad company in good faith. This would leave the act applicable to all lands that are still held by the railroad company and which were granted by the General Government to the State for the benefit of the railroad company.

Mr. LACEY. The last part of section 1 provides expressly that—

> No patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed.

Now, in order to protect settlers still further, so that they might not even be required to go into court and make defense, the option has been given to them under sections 2 and 3 to simply file their statement with the Secretary of the Interior (if they want to avoid litigation), setting forth the fact that they are bona fide settlers; and then it is provided in express terms that no suit shall be brought in relation to those lands until the matter is first investigated in the Department; and if, after adjudication there, it is held, that they are not bona fide settlers, that adjudication is not conclusive against them, but they can still make their further defense in the courts.

The committee has been very tender in behalf of these bona fide settlers and has endeavored to protect them, not

only in the courts but out of the courts, and has provided means by which they may avoid coming into the courts at all.

Mr. Speaker, I move the previous question on the amendment and the substitute.

Mr. HEPBURN. I hope my colleague will not do that. I want to correct a misstatement which he has fallen into.

Mr. LACEY. How much time does my colleague want?

Mr. HEPBURN. Five minutes.

Mr. LACEY. Very well; I withdraw the demand for the previous question and yield to the gentleman five minutes.

Mr. HEPBURN. Mr. Speaker, the gentleman assures us that these suits will not be brought. Now, I know personally of an instance where, in the southern district of Iowa, the district attorney has been instructed to bring suit to recover some 25,000 acres of land. In order to bring any one of these suits, he says that it will be necessary for him to make parties to the suit all of the inhabitants of the Town of Hastings, in Mill County, Iowa. There will be nearly 1,000 defendants in that suit alone. They can not recover without going through that process. It is true that no judgments will be rendered against any one of those persons by this fact, because they are bona fide holders; but they must appear in court and affirmatively show that fact. And my colleague ignores that condition of things entirely.

My colleague is in error again in another statement. The proposition I urged as an amendment to this bill does not do that which he says it will do. Whenever a mistake of fact has been made or a fraud perpetrated, actual or constructive, under my amendment suit may be brought. I only want to protect the settlers where there has been nothing of this sort, neither a mistake of facts nor a fraud of any kind. If fraud be found to exist, suits will be brought notwithstanding the adoption of my amendment. No lands are covered in the operation of this statute except, as I have said before, those issued under the rulings or construction of the Department, which has been continued from 1849 up to about 1875, twenty-five years or more of a continuous, uniform construction, which they are now seeking to overturn by later regulations or rulings.

I do not think, Mr. Speaker, that this is fair, and I do not think it is just to the people. My friend from Iowa says that suits could not be brought in many cases. I assert that every man living in the eighth congressional district of Iowa who owns lands that were conveyed under any one of these grants will have reason to fear a suit if this bill becomes a law. He cannot know what particular land the Secretary will select for the purpose of suits. Everyone will fear, and he will feel it incumbent on him to affirmatively show to the Secretary, in order to prevent action, that he is a bona fide holder. He will be put to that expense, and it will cost the people of my district tens of thousands of dollars to make this showing, and what I say of that district may be truthfully said of every district in the State of Iowa, in Nebraska, Missouri, Kansas, and in many parts of the State of Illinois.

Every representative, Mr. Speaker, is interested, it seems to me, in behalf of his people in preventing this kind of litigation. If we adopt my amendment there will be no danger of that, and all the purposes the bill seeks to accomplish will still remain unimpaired.

Mr. HOPKINS. Will the gentleman in charge of this bill yield for a question?

Mr. LACEY. Certainly.

Mr. HOPKINS. Will the gentleman from Iowa state in a word what objection there is to the adoption of the substitute offered by his colleague from Iowa.

Mr. LACEY. It is very simple and only this: If the amendment be adopted we may as well kill the bill. There would not be enough left to swear by, although there might be enough to swear at. [Laughter.]

Mr. HEPBURN. Will not every case of fraud be still open to investigation under the bill?

Mr. LACEY. I was trying to answer my friend from Illinois. The amendment amounts to this: That no patent shall be hereafter canceled or annulled in behalf of the United States by suit except in cases where actual fraud is shown.

Now, hundreds of thousands of acres of these lands, by reason of departmental mistakes in construction of the law, have been patented to the railroad and wagon companies that never should have been patented to them. If the land

has been sold we confirm the title of the purchasers from the companies. But if it has not been sold there is no reason why the company should retain it. That is the only difference between my colleague and myself. His proposition that we shall only go behind the patents in case of actual fraud would nullify this bill and also the act of 1887, which requires that all these railroad grants should be reexamined and readjusted in the light of the decisions of the Supreme Court.

Mr. HOPKINS. Now, just a further question. If I understand you correctly, if the amendment of your colleague is adopted it will confirm in the railroad and wagon-road companies all lands that they hold patents to that have been issued by mistakes in the Department?

Mr. LACEY. Certainly; every acre of them. Now, that ought not to be done, either.

Mr. HOPKINS. And that will take away all chance of upsetting these titles or again acquiring title to that property.

Mr. LACEY. We should not pass this bill after putting that sort of an amendment in it which will confirm all these mistakes, because the number of fraudulent patents is not very great. I yield five minutes to the gentleman from Nebraska [Mr. Andrews].

Mr. ANDREWS. Mr. Speaker, the pending amendment affects the title to about 201,000 acres of lieu lands in the State of Nebraska. If there should be any disturbance of the titles held upon those lands the whole matter could be carried back to affect injuriously an equal amount of land in another portion of the State, and thus involve the interests of settlers on over 400,000 acres of land in the State of Nebraska. About 201,000 acres of land were accepted by a certain grantee, in lieu of other lands to which that grantee was entitled in the South Platte country. The lands accepted in the North Platte country, in the State of Nebraska, were, in some instances, less valuable than those in the South Platte country. Nevertheless, the grantee accepted these lieu lands rather than disturb the settlers who had filed homestead and other entries upon South Platte lands properly included in the grant to which I have referred.

Mr. LACEY. May I ask the gentleman a questio right there?

Mr. ANDREWS. Certainly.

Mr. LACEY. I should like to ask him whether he deems it important for the interests of this large number of settlers in the great tract of public lands in his district that this bill should go through confirming these titles so as to protect them?

Mr. ANDREWS. I do, Mr. Speaker, and I earnestly hope that the amendment proposed by the chairman of the committee will prevail. We have had an experience in Nebraska on a question like this, and I urge that no mistake be made in protecting our people from another experience so unsatisfactory to the settlers in the State of Nebraska. With this amendment, and another slight amendment that may be proposed later on, I earnestly hope that the bill may become a law. But, with the permission of the House, I desire to call attention to another important fact bearing upon this question.

The grant under consideration covers a period of about twenty-five years. Farmers have purchased lands under it and have invested the labor of almost a quarter of a century in the building of their homes.

If a period of ten years is sufficient to acquire title in other cases, why should not fifteen, twenty, or twenty-five years be sufficient for these pioneer farmers to secure absolute titles to their lands? Why should they be held in continued dread that they may be called into court to defend their titles?

They have earned their homes by the patient toil and struggles of years and should be given the absolute assurance that their titles will be confirmed without further delay.

Mr. TAWNEY. I should like to ask the gentleman from Iowa if he has any objection to incorporating in this bill a provision that will throw upon the Government the burden of proving in the first instance whether or not the sale from the railroad company to the purchaser was made in good faith, instead of putting the burden of proof of that fact, as the law of 1887 does, upon the purchaser in the first instance? The Government now proceeds upon the assumption that he is not a purchaser in good faith, and throws

the burden of proof of ascertaining that fact upon the purchaser. I will ask the gentleman if he has any objection to a provision imposing upon the Government the burden of ascertaining as a condition precedent to its right to bring suit whether or not the settler is a bona fide purchaser? That will be a substantial protection to the actual, bona fide purchaser.

Mr. LACEY. Why, certainly I have an objection to that. The law is very simple now, and if a bona fide purchaser is brought into court, he, above all persons in the world, knows his own innocence, and if he can not prove it—if he is afraid to go into court and prove it—it certainly is of a very doubtful character. Now, to have the presumption of innocence apply to all these cases would practically handicap the Government to the extent that it could never rectify any of these errors in patents.

Mr. TAWNEY. The gentleman did not understand my question.

Mr. LACEY. I understand it fully. You want to shift the burden of proof.

Mr. TAWNEY. Only in cases where the land is certified erroneously; not where it is certified through fraud or misrepresentation. Only where the error has been committed by the officers of the Government, and because of that error the land has passed into the possession of an actual, bona fide purchaser.

Mr. LACEY. This bill absolutely confirms the title to all that kind of land, and the assumption that the Government will bring suits where it knows it will fail, where the officers of the Government know the act of Congress has confirmed the title, is an assumption of something that I do not think we shall ever be faced with in the future. I do not think the suggestion ought to be put in this bill.

Mr. Speaker, I move the previous question upon the amendment and the substitute.

The SPEAKER. Does the gentleman move the previous question upon the bill?

Mr. LACEY. There will be perhaps one other item of the bill to consider before the previous question is moved upon the bill. I move it upon the amendment and the substitute.

Mr. TAWNEY. If the previous question is ordered upon the amendment and the substitute, and if the substitute offered by the gentleman is voted down, will it be in order then to offer another substitute for the amendment offered by the gentleman from Iowa?

The SPEAKER. It will.

The previous question was ordered.

The SPEAKER. The previous question is ordered upon the amendment offered by the gentleman from Iowa [Mr. Hepburn] and the amendment offered by the chairman of the Committee on Public Lands.

Mr. TAWNEY. That is the substitute.

The SPEAKER. It is an amendment to the amendment. The question is on agreeing to the amendment to the amendment offered by the chairman of the Committee on Public Lands.

The amendment was agreed to.

The SPEAKER. The question is on agreeing to the amendment as amended.

The amendment as amended was agreed to.

(28 Cong. Rec., Pt. 2, pp. 1936-1938.)

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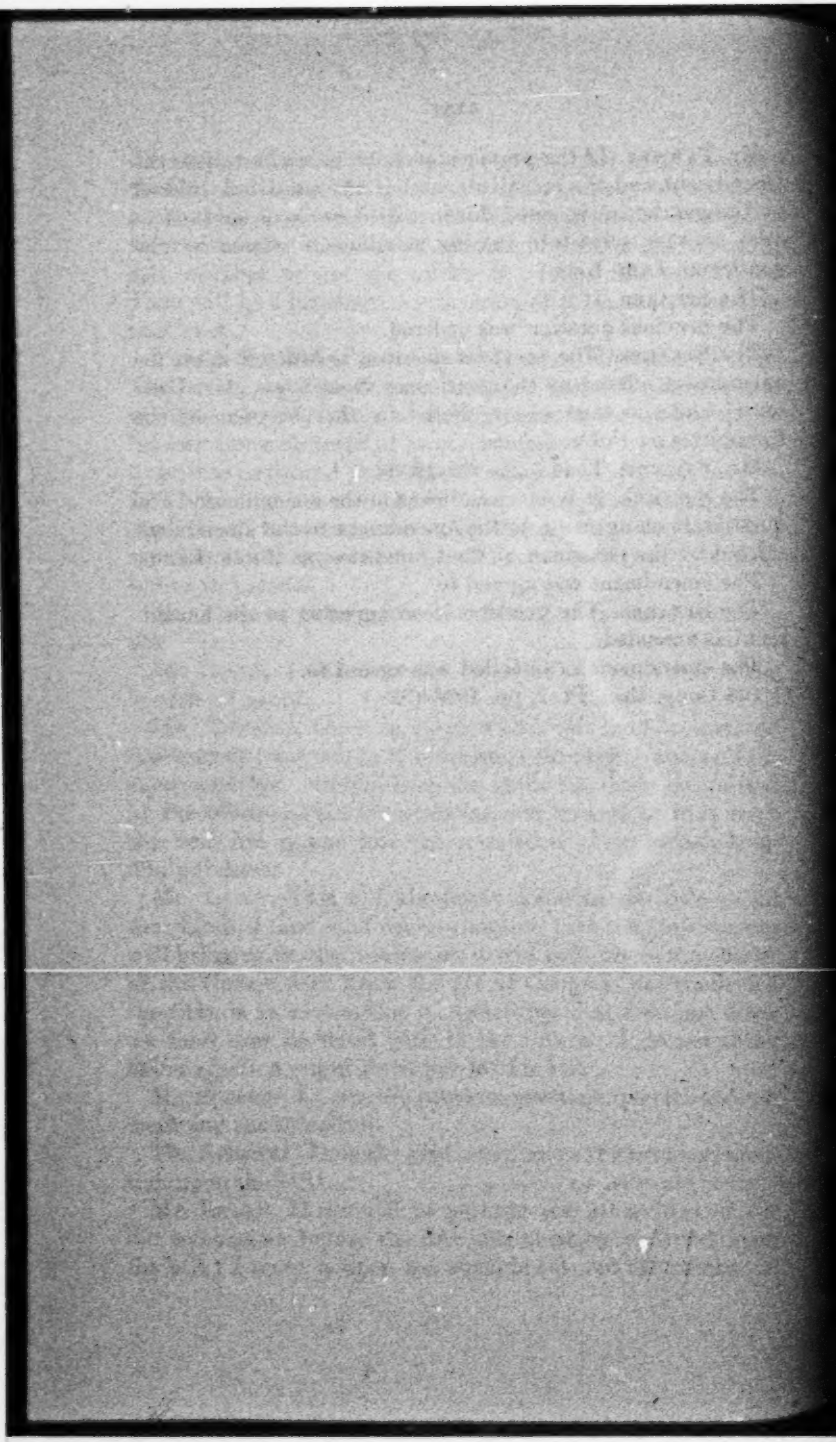

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No. 25065

IN THE

SUPREME COURT OF THE UNITED STATES

THE UNITED STATES,
Appellant,

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY AND GREAT NORTHERN RAILWAY COMPANY,
Appellees.

BRIEF OF APPELLEES

PRELIMINARY STATEMENT.

I.

In order that the Court may understand the argument in this brief, we desire to make a preliminary statement as to the nature of the action and as to what has been argued in the courts below and what is presented now.

(1.)

The Nature of the Action And Grounds of Motion to Dismiss.

The action is brought by the government against the Manitoba Company to annul a patent to certain lieu lands of a limited character in Flathead (now

Lincoln) County, Montana, which lands had been heretofore selected by and patented to the Manitoba Company under the Act of August 5, 1892 (27 St., 390), granting to the Manitoba Company the right to select lieu lands in lieu of certain Dakota lands which had been relinquished by the Manitoba Company to the United States because of the failure of the government and its officers to withdraw the Dakota lands from sale and entry, whereby confusion was caused by reason of the conflicting claims made to said Dakota lands by the Manitoba Company and the settlers upon said lands, who had been induced, by the omissions of the government officers, to settle on those lands, which confusion was only relieved by the Manitoba Company relinquishing the Dakota lands to the government, as aforesaid, in return for the lieu land grant of August 5, 1892.

The cardinal fact to bear in mind, therefore, as regards the lieu lands of the limited character here in question is that they were received by the Manitoba Company by virtue of a selection and patent about 1907 under its grant of 1892 given in return for its giving up Dakota lands theretofore granted to it, which it relinquished to the Government in order to avoid confusion caused by the Government itself.

The facts are set forth in the preamble to the Manitoba Company's lieu land grant. Lands had been granted in Dakota to the Manitoba Company, but the Land Department did not recognize the validity of such grant, declined to withdraw the same from sale and entry, permitted settlers to enter thereon, and even

patented some of said lands to said settlers. The Manitoba Company asserted its rights to said Dakota lands in court, and in the case of St. P. M. & M. Ry Co. vs. Phelps (137 U. S., 528; 11 Sup. Ct., 168), the title of the Manitoba Company was sustained. The Manitoba Company had thus secured title to the Dakota lands, which title had been confirmed by a decision of the highest court. It was about to evict the settlers from said Dakota lands when, to correct this condition and hardship upon the settlers resulting from the Government's own mistakes, the Act of 1892 was passed whereby the Manitoba Company relinquished its Dakota lands, the title to which it had perfected and the title to which in said Manitoba Company had been confirmed after prolonged litigation and received in return therefor the lieu land grant in question.

The lieu lands here in question, therefore, are of a limited, peculiar character, that is to say, they are lands which have been patented to the Manitoba Company under this second grant in lieu of other lands (Dakota lands) covered by a grant (the Manitoba Company's first grant), which were relinquished by the grantee (the Manitoba Company) in consequence of the failure of the Government and its officers to withdraw the lands in the first grant from sale and entry.

This brings them directly within the prohibitory proviso at the end of Section 1 of Chapter 39 of the Statutes of 1896, defining the rights of and limitations upon Government officers in bringing suits to annul railroad land patents.

To determine this appeal it may be necessary to read this entire Act of March 2, 1896, Chapter 39, but in fact we are concerned only with the fourth subdivision of Section 1, that is to say, the proviso to Section 1. Said Section 1 in its entirety reads as follows, the subdividing thereof being done by us for convenience in references:

"Be It Enacted, by the Senate and House of Representatives of the United States of America in congress assembled, that (*a*) suits by the United States to vacate and annul any patent to lands *heretofore erroneously issued* under a railroad or wagon road grant shall only be brought within five years from the passage of this act, and (*b*) suits to vacate and annul patents *hereafter issued* shall only be brought within six years after the date of the issuance of such patents, and the limitation of Section 8 of Chapter 561 of the Acts of the Second Session of the Fifty-First Congress and Amendments thereto is extended accordingly as to the patents herein referred to. But (*c*) no patent to any *lands held by a bona fide purchaser* shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed: PROVIDED (*d*) THAT NO SUIT SHALL BE BROUGHT OR MAINTAINED NOR SHALL RECOVERY BE HAD FOR LANDS, OR THE VALUE THEREOF, THAT WERE CERTIFIED OR PATENTED IN LIEU OF OTHER LANDS COVERED BY A GRANT, WHICH WERE LOST OR RELINQUISHED BY THE GRANTEE IN CONSEQUENCE OF THE FAILURE OF THE GOVERNMENT OR ITS OFFICERS TO WITHDRAW THE SAME FROM SALE OR ENTRY."

The appellees moved to dismiss the Bill of Complaint on the ground that this proviso to the statute expressly forbade the maintenance of the suit, and this

motion was sustained, and the only matter now presented is the appellant's statement that this clear prohibitory mandate, in some way, does not mean what it says and does not prohibit the bringing of this suit to annul a patent to lieu lands of the exact limited peculiar character named in this proviso.

(2.)

Contentions Made by the Government.

It is now contended by the Government, as a first argument that the Dakota lands which were relinquished by the Railway Company were not relinquished in consequence of any failure to withdraw them from sale or entry, and hence the lieu lands involved in this suit were not of the limited, peculiar character referred to in the proviso. This is practically the first time that this argument has ever been made. It was merely hinted at in the argument in the Circuit Court of Appeals.

In the second place, notwithstanding the express general prohibition of the proviso to the effect that "no suit shall be brought" to anul patents to lieu lands of the limited character here in question and notwithstanding the fact that the language of the proviso is in the imperfect tense and indicates an intention to lay down a rule of continuing governmental policy, it is argued by the Government that the history of this legislation through Congress shows that, by judicial construction, three limitations should be placed on its general terms: (1) First, it should

apply only to patents issued prior to the limitation act of 1896, containing the proviso; it is said that the proviso is only retrospective in its operation and not prospective; (2) second, it should apply only to suits brought to annul patents issued absolutely without authority of law; and third, (3) only to patents issued to railroads outside of the limits of their grants under the special circumstances stated in the Government's brief. Practically it is argued that the history of this legislation through congress is sufficient to cut down these general words so as to limit them apparently to the case of a single railroad company, to wit, the Burlington & Missouri River Railway Company in its transactions in Nebraska, or at least to past transactions of exactly identical character only.

Another argument heretofore made by the Government was that the Bill of Complaint alleged a case of fraud, and it was said that fraud vitiates all transactions, and hence that the statute was not intended to apply to cases of fraud; this argument is still renewed under a brief assumption that disastrous results will suggest themselves as natural sequences of upholding the views affirmed by the two lower courts.

It was contended formerly that the whole matter is controlled by the repeated declarations of the government and its well known policy that mineral land shall not be acquired except in accordance with the mineral laws, and that therefore the statute must be construed in the light of the Government's policy; and it was contended that, as the selection of mineral lands under a railroad grant would be a selection not

authorized by law, a patent to such lands under a railroad grant would be void, and the proviso must be constructed to refer only to patents which could lawfully be issued. It was said that, by the Act in question, congress "intended to protect patents which were by law authorized to be issued," but not "when such patents had been unlawfully issued". As this untenable argument is inconsistent with the present brief filed by the Government, and as it was held in the Phelps case, already referred to, that the positive declaration of a statute could not be controlled by an alleged governmental policy, we will assume that this has been abandoned.

We desire now to consider these arguments in the order given above and under the following headings, to wit:

A. Were the Dakota Iands Relinquished in Consequence of the Failure of the Government or its Officers to Withdraw the Same from Sale or Entry.

B. The History of the Proviso Through Congress: What Does This History Show and Can Resort be Had to This History to Construe Away the Plain Prohibition of the Proviso?

C. The Proviso by its Express Terms is not Limited to Past Patents, But is Prospective as Well as Retrospective in its Operation: It Provides for a Continuing Governmental Policy.

D. Can Cases of Alleged Fraud be Excepted From the Prohibition of the Proviso; or do Disastrous Consequences Follow Upholding the Action of the Lower Courts in Yielding to the Prohibitory Mandate of the Proviso.

II.

ARGUMENT.

A.

WERE THE DAKOTA LANDS RELINQUISHED IN CONSEQUENCE OF THE FAILURE OF THE GOVERNMENT OR ITS OFFICERS TO WITHDRAW THE SAME FROM SALE OR ENTRY?

The proviso says that suits shall not be brought to vacate patents to lieu lands of a certain limited peculiar character, that is to say, patents to lieu lands, which patents were issued in lieu of lands lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry.

It is conceded that the Dakota lands were not lost by the Manitoba Company because of any failure of the Government officers; on the contrary, as is stated in the Government's brief, the Railroad Company, after expensive litigation, had conclusively established its title to said lands. The question presented is whether they were relinquished by the Manitobia Company in consequence of the mistakes of the Government and its officers.

It is weakly conceded by the Government that they were in fact relinquished. The concession should have been stronger. There can be no question at all that they were relinquished. A relinquishment is simply a giving up, a releasing, of the lands. If they were

not relinquished by the Manitoba Company, then the Manitoba Company still owns them, which is contrary to fact. The Act of 1892 expressly required that the Railway Company should relinquish the Dakota lands and was to relinquish all claim thereto.

As the lands in question were relinquished, therefore, the only question is whether they were relinquished in consequence of the Government's errors. The Government says they were not relinquished in consequence of the Government's errors, but in consequence of the offer of the lieu lands made in the Act of 1892 and in consideration of that offer.

(a.) The fact, however, that they were relinquished in consideration of an offer of the lieu lands does not show that they were not relinquished in consequence of the mistakes of the Government officers; on the contrary, the Act of 1892 expressly shows that they were relinquished in order to correct mistakes of the Government officers, which were very embarrassing to the Government.

If, in relinquishing them to correct the mistakes of the Government officers, such relinquishment is not in consequence of these mistakes, by reason of the fact that lieu lands are offered in return for the relinquishment, then there is no case that could come within that part of the proviso relating to the relinquishment as distinquished from the loss of lands, because the proviso refers to lieu lands, and in any case it could be said that the old lands were not relinquished except in consequence of the offer of the lieu lands. If the Government's contention therefore is correct in

this particular, there is no relinquishment which could be made in consequence of anything other than an offer of new lands, and there could be no lieu land grant following a relinquishment yielded in consequence of the Government's mistakes, because in every case it could be said that the relinquishment was in consequence of the lieu land grant and not of the Government's mistakes. Thus this provision of the proviso referring to lands relinquished, instead of lands lost, is nullified. But the proviso expressly says that no suit shall be brought to recover lands that were either "lost or relinquished in consequence of" the mistakes of the Government's officers. The reference, therefore, to relinquished, as distinquished from lost, lands, is a complete answer to the Government's present argument.

(b) The words "in consequence" mean simply that the relinquishment followed the Government's mistakes in point of time, and that the Government's mistakes were one of the motives or facts naturally leading to or preceding the relinquishment. Here the Manitoba Company had established its title to the Dakota lands, some of which the Government had mistakenly patented to settlers, and the confusion which resulted was a very embarrassing condition to the Government. It was the impelling motive which induced the Government to request and the Railway Company to yield the relinquishment; it was in consequence of this embarrassment that the Government asked the Manitoba Company to come to the Government's rescue. Without these mistakes having been made by the Government, the Government would

not have asked the Manitoba Company to relinquish these lands. If the embarrassing position of the settlers represented simply a dispute between the settlers and the railway Company, doubtless the Government and the Railway Company would have let the effects of the determination of that dispute rest where they fell, but, by reason of the Government's connection as a cause of the settler's embarrassment, the Government felt that it should relieve their embarrassment and, as the Government was the cause of their embarrassment in not withdrawing the lands and in advising the public that the Manitoba Company had no claims to the lands, the mistakes of the Government officers were the cause of the demand pressed upon the Manitoba Company that it should relinquish the Dakota lands, and were the cause of the Manitoba Company accepting the lieu lands.

(c) Moreover, greater equity exists in a case like this one where, to be sure, in consideration of lieu lands, the railroad relinquishes the old lands to correct the Government's mistakes. If the case of lieu lands issued for lost lands deserves protection under the proviso, the case of lieu lands issued for relinquished lands deserves even greater protection. Thus we note that the statute refers to lands which were lost by the grantee in consequence of the failure of the Government's officers and also to lands which were relinquished by the grantee in consequence of the failure of the Government's officers. An example of a case where they were lost is found in the case cited in the Government's brief, where settlers settled upon

the railroad lands before they were identified and before the railroad's rights attached. The railroad in such a case thus lost lands which it would normally have acquired, and it, the Land Department, without any authority in law, desired to give relief in this case by giving the railroad an equal quantity of land elsewhere. The Government concedes that such a case comes within the proviso and that such lands were lost in consequence of the failure of the Government to withdraw the lands. It might, however, be argued much more forceably that such lands were not lost in consequence of the action by the Government's officers but were lost rather in consequence of the company not having definitely located its line or the lands not having been definitely surveyed. We all, however, concede that such lands are deemed lost in consequence of the failure of the Government to withdraw them.

With how much greater force, therefore, can it be argued that where the Government has not withdrawn lands, but has mistakenly patented them to others, and the situation is embarrassing to the Government, and the Government therefore because of this embarrassment asks that the lands be relinquished and offers a consideration for such relinquishment, such relinquishment is demanded and results in consequence of the Government's mistakes!

Moreover, if lieu lands are granted to take the place of lost lands, whether such lands are lost by reason of the faults of the company, in not locating its line more promptly, which results in the lands not being withdrawn from entry, or whether such lands are lost to

the company by reason of the mistakes of the Land Department, such a case of a gratuity on the part of the Government does not present one-tenth of the merit of the case where a company has established its title and voluntarily relinquishes that title for the accommodation of the Government.

(d) In this connection it is said in the Government's brief that the proviso should be limited to lieu land patents issued by the Land Department to correct its mistakes but without any authority in law for the issuance of such patents. The proviso is not so limited and we similarly inquire why a railroad company that, has been the recipient of such unlawful, gratuitous action moving to it from the Government, should be preferred over another company that gave at least value for value, and owned a title embarrassing to the Government, and, perhaps as a gratuity moving from it to the Government, or at least as an assistance to the Government, gave up that title and received lieu lands therefor under express authority of law? Why should the recipient of gratuitous, unlawful action on the part of the Government's officers in correcting their mistakes and the resulting injustices to the recipient only, be preferred over one who has received a lieu land patent issued under express lawful authority in return for lands relinquished by the special request of the Government to correct its mistakes and avoid injustices to others? The proviso clearly recognizes that, where the lieu land patent is given to correct the mistakes of the Government itself, the patentee has already had its share of the burdens

of disputes or litigation, and good faith requires the Government to give preferred protection to the lieu land patent as a muniment of title in both cases. But certainly there is nothing in the proviso which can be found to declare that the recipient of a gratuity that had nothing to give up is to be preferred over one who comes to the rescue of the Government itself, or that a participant in unlawful action for his own benefit is to be preferred over one who has proceeded under the express provisions of law and has acted solely for the relief of others.

(e) It is not hard to find reasons for the proviso as a continuing rule of just Governmental policy in both cases. Thus, in the case of lost lands it is conceded that the railroad company had nothing to give; it had lost its rights; and the Government had made up for that loss by giving lieu lands, but the patentee had already suffered enough from disputes or litigation resulting from the Government's own mistakes. If patents in such a case deserve consideration, how much greater do the patents in this case deserve consideration! For here the Manitoba Company had not lost anything; on the contrary, to the utter embarrassment of the Government's officers it had conclusively established its title, and it gave up that title for the benefit of the Government. In such a case, not as any charity to the railway company, but as mere good faith on the part of the Government, it is natural that we find that in determining the conditions under which suits should be brought to annul railroad land patents it is provided that in the case of lieu lands

which the railroad company has received from the Government, as the result of its having come to the rescue of the Government by relinquishing other lands which it owned, no suit should be brought to set aside a patent to the lieu lands of this limited character. In other words, the object of this proviso was to confirm the sound morality in the proposition that the railroad company should receive, in return for the land which it relinquished, lands equal in quantity and in estate to that which it surrendered and a real muniment of title not subject to further attack or mistake. It gave up lands, title to which it had conclusively established after expensive litigation; it should receive in return therefor nothing less; that is to say, the patent issued to it should be a patent for an equal quantity of land and for an equal estate as that which it gave up. The patents to the lieu lands should thus cover an equal quantity of land and should convey a title of equal quality. To relieve the Government from embarrassment it gave up a perfect title to a certain quantity of lands. The proviso declares that, in addition to receiving an equal quantity of land, the patent should convey a title as unassailable as the title which had been relinquished.

(f) It seems to us perfectly clear that there is no possible ground for holding, as is now practically argued for the first time, that the Dakota lands were not relinquished in consequence of the failure of the Government officers to withdraw them from sale or entry. The whole reason for the lieu land grant to the Manitoba Company was the embarrassing situa-

tion of the Government as the result of its own mistakes, and it appealed to the railway company to relinquish the Dakota lands so as to relieve it from that embarrassment. It ill becomes the Government at this time, when the railway company accepted its assurances as to the necessity of correcting those mistakes by obtaining a relinquishment of the lands, to now argue that such relinquishment was not made by the railway company in consequence of the insistence of the Government that it needed relief from its embarrassment, but that it was an open trade for lieu lands with which the mistakes of the Government's officers had no connection.

(g) Lastly, that the relinquishment provided for in the Manitoba Company's lieu land grant was in consequence of the Government's mistakes and to correct these mistakes is conclusively established by the Act itself, which expressly provides that the lands to be released for lieu lands shall be limited to those Dakota lands only in which settlers had, under the mistaken rulings of the Government, attempted to acquire rights. But if the lieu land grant to the Manitoba Company was not in consequence of the Government's mistakes as to the Dakota lands, and if the railway company was not required to relinquish the Dakota lands in response to the insistent demands of the Government that the railway company's title was embarrassing in the extreme, why did not the Government offer lieu lands to the Manitoba Company for any other lands held under its grants other than those as to which claims of settlers had attached by

reason of the mistakes of the Government? Yet we find it expressly provided in this lieu land grant that the releasing of the railroad lands shall be limited to lands as to which rights of others had attached by reason of the mistakes of the Government officers.

B.

THE HISTORY OF THE PROVISO THROUGH CONGRESS. WHAT DOES THIS HISTORY SHOW, AND CAN RESORT BE HAD TO THIS HISTORY TO CONSTRUE AWAY THE PLAIN PROHIBITION OF THE PROVISO?

It is said that the history of this legislation through Congress shows that it was not intended to refer to lieu lands lost or relinquished under the limited circumstances here stated, but was intended only to refer to lieu lands (a) patented prior to the passage of the Act and (b) outside the granted limits and (c) under the special circumstances stated in the Government's brief. This same argument has been made heretofore, but now a more complete reference is made to the history of this legislation through Congress. However, the references made in the Government's brief to the history of this legislation through congress is not complete, and the Debate on the return of the bill from the Senate has been overlooked. It is necessary, therefore, to refer to the Congressional Record and to review the history of this legislation through Congress.

In this connection we will state that the history of this legislation through congress is found in Volume

28 of the Congressional Record setting forth the First Session of the Fifty-fourth Congress, parts 2 and 3, pages 1009 to 2000, and 20001 to 3008; more particularly it is found on pages 1294, 1760 to 1766, 1904 to 1906, 1934 to 1940, 1963, 2067 (which single page represents all proceedings relating to the Senate debate), 2093, 2144, and 2169 to 2172. These last four pages are an important part of the debate which the Government has overlooked; the succeeding pages in the Congressional Record relate only to the engrossment and formal signing of the bill.

This record will show how unsafe it is, especially in this case, to rely upon debates to construe away plain provisions of a statute, and in any event these references will show that, far from narrowing the provisions of the statute, they strengthen the very contentions which we are making.

Summary of What the Congressional Record Shows.

The debates on this Bill illustrate with peculiar force here the wisdom of the rule that a legislative act, clear in its probibitory mandate, cannot be construed away by going back of the law itself and considering the individual expressions of its supporters or opponents as to what the proposed law means in the course of the debate. We assume that the Court will not construe the law in the light of the debates without reading the entire record of the debates as above set forth. As an assistance in such review we would make the following observations.

In the first place, in this instance the bill was

necessarily passed through both Houses in great haste. This is shown all through the proceedings during each of the few times that consideration was given to the Bill. Therefore it was impossible for the debate actually to reveal the motives impelling any considerable number of the members of congress who passed it; whatever some half dozen individual members said, these expressions cannot under the circumstances be taken to express the interpretation put on the bill by the many members who voted for or against it.

In the second place, the debate was limited to the proceedings in the House, and the bill went through the other branch of the legislature under the stress of the necessity of taking prompt action, and practically without debate there at all and under the assurance that the committee had given every phase of the Bill full and unanimous consideration.

In the third place, the whole attitude of the House, where alone the matter was debated, was antagonistic to these siuts and recognized that the Executive Department had proceeded and might proceed with oppression, and the whole anxiety of the House was rather to cut down the power of the Government than to increase this power, and to strengthen a patent as a final declaration of the rights of the patentee.

In the fourth place, we would call attention to the fact that though, as is perhaps natural in a political body, most of the expressions found in the debates exhibited a concern for individual patentees or individual transferees of patentees, and not for corporate patentees or transferees, there were a few members

who openly and frankly expressed the view that the legislation to be passed should protect the railroad corporations, that had developed the west, against unfair or oppressive or over-zealous action by the Government's representations, and it was appreciated, as regards lieu lands taken in acquiescence in the Government's construction of the laws, or taken to relieve the Government from embarrassment by reason of its own mistakes, full protection should be extended. The final conclusion reached was an extremely moral law, which antagonized only those who were so zealous, in their desire to give the Government representatives full power to oppress, that they exclaimed even against the provisions of the law introducing a new policy in favor of purchasers in good faith. Thus it was this voice (sufficiently loud as regards the protection to be given to the individual; faint but yet clear and fearless as regards the equal protection to be given to the corporation, that finally called forth the amendment in question in regard to the lands of the character here in question, without which amendment it is doubtful in the then temper of congress towards these vexatious suits, whether the bill could have been passed.

Lastly, the opponents of the measure, with some political shrewdness in their efforts to criticize it, called attention to the fact that the arguments of the advocates of the measure had been in the main to cut down the power of the Government and to protect the individual, while the Bill itself, as we contend here, in its proviso expressly gave corporations absolute pro-

tection in the case of lieu land patents of the character here in question. Apparently the majority, however, appreciated the morality of the limited lieu land patent protection afforded just as they also appreciated the morality of extending protection to purchasers in good faith as to all lands.

We have reviewed these observations on the history of the legislation more in detail in an appendix to this brief.

We find, therefore, that in spite of counsel's dilligent effort to find some aid in the record of the legislative proceedings concerning the enactment of this law, no passages are found which can, in any way, explain away or nullify the plain direction of the proviso. On the contrary they strengthen the proviso. Moreover, it cannot be contended that, out of the entire membership of the House of Representatives and of the Senate of the United States, the few who spoke were the only persons whose minds operated in connection with the enactment of this law. Undoubtedly other members of the Houses of Congress had in mind exactly the considerations which we advance in this brief, and their express judgment as to the policy which should be pursued cannot be nullified by construction.

Though it would be contended by the Government, in any particular case, that a statute which was ambiguous or unintelligible might be saved by construction and by reference to the records of Congress orto Legislative history, it cannot be contended that such Legislative history could be resorted to where the statute

is plain in its directions and intelligible and salutary in its actual operation.

Thomas vs. Vandegrift, 162 Fed. 645 at 642; 89 C. C. A. 437.

U. S. vs. Union Pac. Ry. Co., 91 U. S. 72; 23 L. Ed. 224 at 228.

U. S. vs. Trans. Mo. Ft. Assn., 166 U. S. 290; 17 Sup. Ct. 540 at 550.

St. Paul M. & M. Ry C., Phelps, Supra.

In the Manitoba Company's Phelps case, supra, the Court said:

> "We think that the language of those acts is too plain and unequivocal to need or even to admit the aid of an extrinsic rule of construction to get at the intent and meaning of congress. * * * Where a statute, as in this case, is clear and free from all ambiguity, we think the letter of it is not to be disregarded in favor of a mere presumption as to what is termed the policy of the government, even though it may be the settled practice of the department."

For these two reasons, therefore, we maintain that the Legislative history referred to affords no escape to the complainant, because:

(1) The debates to which counsel refer do not weaken but strengthen the proviso; and

(2) Such records can never be resorted to where the statute is intelligible and reasons are found for its practical operation.

B.

THE PROVISO BY ITS EXPRESS TERMS IS NOT LIMITED TO PAST PATENTS BUT IS PROSPECTIVE AS WELL AS RETROSPECTIVE IN ITS OPERAIONS. IT PROVIDES FOR A CONTINUING GOVERNMENTAL POLICY.

In its argument drawn from the history of this legislation through congress and in its suggestion that the Dakota lands may not have been relinquished to correct Government mistakes, the Government states that the proviso was intended only to apply to a condition existing proir to the passage of the act and that thus the proviso should, by judicial construction, be limited to prior patents only and given only a retrospective operation. This, however, would be contrary to the express language of the proviso and of the statute indicating expressly an intention to provide for a rule of continuous policy.

(a) This argument was formerly based by the Government on the words "certified or patented" which were characterized as in the past tense. We formerly pointed out that even if these words were in the past tense, this would not be decisive as the question would still arise from what point of time does this past tense relate back. To say that the words "certified or patented" mean "certified or patented prior to the passage of the Act" begs the question and we can still ask why is it not as reasonable to assume that they refer to lands "certified or patented prior to the institution of the suit."

Moreover, the expression "certified or patented" occurs in very many other portions of the statute where, of course, the same construction must necessarily be given and such a limited construction would seriously impair the efficiency of the somewhat elaborate system provided for the protection of bonafide purchasers and otherwise seriously curtail the entire Act as a plain legislative limitation upon the power of the Government officers to bring vexatious suits.

In this connection also we note that the last event mentioned in the proviso prior to the words "certified or patented" is the institution of a suit. Those words, therefore, under a well known rule of grammatical construction would refer back to the event last specified, to wit, the institution of a suit. The proviso says that "No suit shall be brought for lands that were certified or patented in lieu of other lands" etc. of the character discussed. The last event specified is the institution of a suit and hence these words "certified or patented" must be construed to speak from the time of the last event mentioned, to wit, the bringing of the suit.

(b) It will also be noted, as is commented on in the opinions in the lower courts, that when, in this general statute defining a continuing Governmental policy, congress desired to limit the operation of the general words used, it had no difficulty in finding appropriate language. Thus the first part of the section expressly refers to "patents heretofore issued" and in the third section congress took perhaps greater care in a particular matter to specify the time from

which the past tense is to be deemed to speak and expressly declared in a portion of section 3 that reference was made to "any time prior to the institution of suit."

(c) However, as no emphasis is now placed by the Government on these words, we will not cover the argument as to the meaning of these words as indicating the past tense but will now proceed to show that the words actually use dare not in the past tense but in the imperfect tense to indicate a continuing course of conduct and that the language used in the proviso, therefore, expressly forbids giving the proviso a mere retrospective operation.

Thus, *if it was the intention* of Congress to limit the operation of the proviso to patents issued prior to the passage of the act, *the expression used, "lands that WERE* certified or patented," *is not an apt one. The more natural,* and in fact the *only technically grammatically correct expression* to convey this meaning *would have been "lands that* HAVE BEEN certified or patented." It is inconceivable that if Congress had intended the proviso to operate only retrospectively, this last usual and technically correct expression, referring to lands that have been certified or patented, would not have been used. The failure to use this expression is, therefore, a strong argument against finding in the statute an intention that it, or the proviso, shall be limited only to a retrospective operation. To express such an intention the words "WERE PATENTED" are awkward, and, for reasons now to be stated, are also grammatically incorrect. To express

such an intention the words "HAVE BEEN PATENTED" would be fluent and technically accurate.

Note, that, in the only instance where the act was intended to operate retrospectively only, express reference is made to "patents heretofore issued."

The act is thus not expressed in the past tense. *The proviso is worded in the imperfect, not the past tense. The expression used* is not simply "certified or patented," but "*were* certified or patented," which necessarily indicates the imperfect tense, and *refers*, therefore, *to a continuing course of conduct.* This, in fact is the only tense, and the only expression which would be grammatically proper to express the intention which we are contending has been expressed, to-wit: a continuing course of conduct, a continuing Governmental policy applicable not only to patents previously issued, but to all patents whenever issued, a complete system covering the subject of railroad patents.

The imperfect tense is thus defined in the Century Dictionary:

Imperfect:

Adj. in gram.: Designating incomplete or continuous action, or action or *condition conceived as in progress* when something else takes place.

Noun: in gram.: An imperfect tense; a *past continuous tense.*

If the proviso had been intended to refer only to patents issued proir to the passage of the act it should be noted that this meaning cannot be made grammatical by inserting in the proviso, as actually drawn, or merely adding, a few words expressive of that inten-

tion. For example, the proviso would not be grammatically correct if we should add an express declaration of such an intention, by changing the proviso, by addition, so that it would read as follows:

> "But no suit shall be brought or maintained for lands that *were certified* or patented *prior to the passage of this act* in lieu of lands," etc.

The use of the imperfect tense instead of the past tense in this instance would be grammatically incorrect.

In order to express such an intention, it is necessary not only that an addition be made to the proviso, but also that it be redrafted by the elimination of the word *"were"* and the substitution of the words *"have been,"* so that the proviso would read:

> "But no suit shall be brought or maintained for lands that *have been certified* or patented *prior to the passage of this act* in lieu of lands," etc.

On the other hand the intention which we contend is expressed might be stated with more verbosity by mere additions to the statute, without the necessity of any substitution, so that the proviso would read as follows:

> "But no suit shall be brought or maintained for lands that were certified or patented prior to the institution of suit in lieu of other lands," etc.

In fact this change would be *simply a concession to verbosity* and the proviso, as so modified, would not be clearer; as actually drawn the proviso expresses this exact intention in concise form and with strict regard to grammatical construction.

The entire statute is plainly intended to constitute a continuing governmental policy, to establish a system

applicable to a course of future events and to all cases of patents to railroad lands. This is especially plain and *expressly* provided in the proviso by the use of the word "were," which indicates the imperfect tense, and therefore a course of conduct or events, and the same tense is implied by the use of the words "patented or certified" in other portions of the statute.

(e) The government itself in its former briefs declared that Section I of the Act of 1896 is divided into four parts. First, it provides the time within which patents issued prior to the act may be set aside. Second, it provides the time within which patents issued after the passage of the act may be set aside. Third, it then protects the title of bona fide purchasers, and clearly this refers to lands patented as well after as before the passage of the act. Fourth, there is the proviso in question which, with equal clearness, refers to lands patented as well after as before the passage of the act. The government's own former summary or detailed analysis of the section thus shows that the first subdivision relates to patents issued before, the second subdivision to patents issued after, and the last two subdivisions to patents both before and after the passage of the act.

A reading of the section indicates the progress of the legislative mind from limited, confined fields to general, unbounded areas. Thus, first it confines its attention to prior patents. Then it progresses to the second field, or future patents, and, finally, having covered these limited areas, it progresses into the domain of a continuing policy applicable to all patents,

past or future, by protecting all bona fide purchasers and by protecting lieu land patents of the peculiar character here involved.

In the first two subdivisions Congress was careful to distinguish between prior and future patents. Certainly the government will concede that in the third subdivision these restrictions had been abandoned, and that the legislative attention was then directed to patents generally. What ground is there for assuming that *in then progressing* from the third to the fourth subdivision *Congress was reverting* to the first.

(f) To carry out the government's construction the orderly arrangement would have been to have inserted the proviso in the first subdivision. The fact that the proviso was not made a proviso only to the first subdivision shows that it did not belong there, and was not intended as a limitation only upon the first subdivision. Its place at the end of the section makes it, by its position, a proviso modifying not merely limited portions of the section but modifying the entire section, as well the portions of the section relating to future patents, as the portion relating to past patents.

Our view as to the meaning of the words of the proviso is thus strengthened by its position in the section as a proviso to the entire section, and not as a proviso to any single portion. To sustain the government's contention it is thus necessary in logical and orderly procedure to change the wording of the proviso and also its position in the section, so that the section would read:

"That suits to vacate any patent to lands here-

tofore issued shall be brought only within five years from the passage of this act; provided that no suit shall be brought for lands that have been certified or patented in lieu of other lands relinquished by the grantee in consequence of the failure of the government to withdraw the same, and suits to vacate patents hereafter issued shall only be brought within six years after the date of the issuance of such patent, but no patent to any lands held by bona fide purchaser shall be vacated."

There is no authority in law for the judicial branch thus reediting in this double aspect the work of the legislative branch. Any meaning can be found in any statute if we are thus permitted to substitute words and rearrange their positions. Greater violence could not be done towards any statute than is asked by the appellant in this case.

It is, therefore, literally true that, if Congress intended to express the intention now suggested by the Government, Congress has failed to use the most natural expression (lands that *have been* patented) for that purpose, and ,in fact, the only expression that grammatically could be used to express that intention, and at the same time has used an expression (the imperfect tense; lands that "*were* patented") that grammatically is incapable of expressing that intention, and Congress has likewise failed to place the proviso in an orderly position immediately after the first subdivision, and has given it a position as a proviso to the entire section.

On the contrary, if Congress had intended to express the intention that the proviso should establish a continuing governmental policy, applicable to all patents

issued in the course of time, Congress has used the only expression (the imperfect tense; lands that "were patented") that grammatically is capable concisely and accurately of indicating such an intention, and has accurately placed the proviso in its logical and orderly position. To sustain the government's contention, therefore, it is necessary either to assume that the statute is not grammatically drawn, or drawn in an orderly way, or to do violence to the exact language of the statute by substiuting other words in the place of those used, and to rearrange them in the section, and the court is asked to do this in spite of the fact that the proviso as actually drawn is grammatically correct, is plain in its direction and is consistent with the remaining portions of the statute, which provide, in common with the proviso, for a continuing governmental policy.

Moreover there is no reason for confining the policy of the proviso to past patents. If, for reasons hereafter to be shown, the policy declared by the proviso is only fair, honest, and just and prompted by the Government's sense of fair play between the parties, the same policy would with equal reason apply to future patents.

D.

CAN CASES OF ALLEGED FRAUD BE EXCEPTED FROMTHE PROHIBITION OF THE PROVISO; OR DO DISASTROUS CONSEQUENCES FOLLOW UPHOLDING THE ACTION OF THE LOWER COURTS IN YIELDING TO THE PROHIBITORY MANDATE OF THE PROVISO?

A second limitation sought to be engrafted on the proviso is found in the assertion that this suit is founded on an alleged fraud of some sort or on a mistake on the part of the Land Department and it is said disastrous consequences may be conceived to result from giving effect to the exact terms of the proviso especially if an outrageous fraud or a palpable mistake occurs. Hence the Government contends that, in some way, by some sort of judicial construction, the plain legislative prohibition must be cut down so as not to include a patent procured by an alleged fraud.

(a) A first answer to this argument is that there is no exception whatever, expressed in the statute. The statute clearly commands that "no suit shall be brought" to annul patents to lieu lands of the limited, peculiar character here in question. It does not state that no suit shall be brought except as regards future patents or except as regards patents procured by alleged fraud or mistake.

No express exception is stated, and, on the contrray, *the statute* expressly negatives any exception in that it *commands that "no suit shall be brought,"* and hence

if any exception is to be found it must be by reason of some fair implication as to the probable intention of the framers of the statute, which must be shown fairly to quaalify, in some way, the positive direction that "no suit" shall be brought.

(b) But *no such exception can be* justly or *reasonably implied,* for the legislature, in drafting this statute, *necessarily had cases of fraud in mind.* The statute provides the time within which, and the conditions under which, land patents may be annulled, and as *the most common grounds for annulling land patents are for fraud and mistake,* and since, in fact, it is almost impossible to suggest any ground for annulling a patent other than the grounds just suggested, we must assume that the legislature had in mind the idea of attacks being made upon patents on the ground of fraud. This is strengthened by the *provisions of the statute in regard to the rights of bona fide purchasers without notice of the fraud.* The whole scope of the statute shows that the main object was to fix the time within, and the conditions under which, land patents could be set aside on the ground of fraud. Hence, as Congress had this very subject under consideration and was expressly protecting the rights of bona fide purchasers without notice of the alleged fraud, an implication that fraud was not intended to be covered would nullify the express provisions of the statute, but, manifestly, implications can never arise antagonistic to the express direction of a statute.

(c) Moreover, if the government is right in contending that the direction that "no suit shall be

brought" excepts from its operation cases of alleged fraud, it logically and necessarily follows that the *same implication would be proper* to restrict the effect of the staute *as to its other provisions,* so that the law would read that "suits to vacate and annul patents hereafter issued, except in cases of fraud, shall only be brought within six years" etc., and thus the *entire act would necessarily become merely an act concerning* the time within which, and the conditions under which *suits* to annul land patents may be brought, *except in cases of fraud,* and the effect of the statute as a statute of repose is practically destroyed.

(d) Another reason why no such implication is proper is found when we *consider the object of the proviso.* It must be remembered that the proviso forbidding any suit being brought to annul patents to lieu lands is limited to lieu lands "that were patented in lieu of other lands relinquished by the grantee in consequence of the failure of the Government, or its officers, to withdraw the same from sale or entry." The lieu lands are thus lands which were patented in return for lands relinquished to correct the errors of the Land Department. *As the grantee relinquishes lands as to which the title was unassailable,* it is only reasonable that this act should provide that *the lieu land patents,* when issued, *should be as valid and effective as the unassailable title which was surrendered.* The proviso does not give the grantee a peculiar advantage in this class of lands. It seems to endeaver merely to restore to the grantee his estate in the relinquished land, or rather *to compensate* him for the

loss of that estate, voluntarily surrendered by him, *by giving him an estate of equal validity in other lands.* It endeavores merely to place him on as good a footing as he was before he aided the government by surrendering his estate in the lands relinquished.

Take the case in hand for instance. As an inducement towards railroad construction the government had granted to the predecessors in interest of the Manitoba Company certain lands now situated in the States of North and South Dakota. Its right to these lands was questioned, and, after years of litigation, it finally established its title as valid and unassailable. This is the title which it relinquished to the government, a title fortified by expensive litigation and a decree of the Supreme Court of the United States. It is now urged that the title which the Manitoba Company received to the lieu land (in return for the relinquishment of the Dakota lands, its title to which had thus been finally established) was nothing but a privilege of being sued. The more reasonable and natural position to take is that, *as the Manitoba Company gave up an unassailable title, the government intended that it should receive in return a title to the lieu lands as unassailable as the unassailable title which was surrendered.* This principal we find carried into the proviso as a sound rule of public policy. In passing this statute of repose and in defining the time within which, and the conditions under which, suits may be brought to annul land patents, the Government announces as a part of its public policy that where the patent is issued in return for a title which has been shown either by lapse of time, by

suit, by presumption or otherwise, to be unassailable, which title was relinquished as an aid in the correction of the errors of the Government's officers, the patent to the lieu land shall be at least as unassailable as the title which was relinquished and no suit shall be brought to annul the same.

(e) We see absolutely no prospect of any dire consequences resulting from enforcing the proviso. Time is given for the Government to investigate. The statute defines the time within which the government may prosecute its inquiries upon, and attack the validity of the title acquired by its grantee: as regards ordinary patents that time runs from the initiation of the proceedings in the land office until six years after the issuance of the patent; as regards ordinary lieu lands, the same period exists but as regards lieu lands of the limited character now in question—lands granted in return for relinquished lands relinquished to correct the Government's mistakes—the time runs from the initiation of the proceedings in the land office until the patent is issued, but when patent is once issued, it becomes a judgment and inquiries into its validity are foreclosed.

As a matter of face the Government, in anticipating disastrous consequences, if any, fails to distinguish between alleged frauds which induce the will to operate and frauds which cause the will not to operate at all. Of course, if the mistake alleged is a clerical error, whereby the patent describes different lands than the selection list, or if at the time when the patent was to be signed, someone fraudulently substituted

the wrong instrument and thereby wrong lands were granted, unquestionably this would be a case where, in fact, the minds of the officers of the Land Department had not operated and the so-called patent would not be a patent at all but would be a mere piece of waste-paper. Mistakes or frauds may be of such a nature as to prevent the mind of the party from operating at all in the transaction, as in a case, where at the time of the signature one instrument is fraudulently substituted for another. In such a case the instrument signed does not constitute an act of the person signing and is mere waste-paper. A so-called patent signed under such circumstances would be no more a patent than if the officers of the Land Department should rise in their sleep and execute a patent. Such a suit would not be a suit to annul a patent as none in fact has ever been issued, but would be a suit to have a cloud on the title removed.

The proviso, of course, covers every case where the minds of the officers of the Land Department actually operate, and under the proviso the Government must make its inquiries between the time of filing of the selection and the time when the patent is issued, and, under the proviso, after the patent is issued, no suit shall be brought to set the patent aside. Thus where the charge made is, as here, that the minds of the officers did operate but this action was induced by a mistake of judgment or an alleged fraud, occurring prior to the commencing of the proceedings actually to issue the patent, then the Government, at the time of the proceedings leading to the actual issuing the patent,

must determine the validity of the preliminary proceedings at its peril. Its patent is its final judgment that the proceedings have been regular and it cannot, under the provisio, thereafter reopen the investigation it made or be heard to say that it made no investigation which it was bound under the law to make.

It was doubtless frauds such as a substitution of instruments that causes the Government to anticipate difficulties; but, as stated, these are not involved here or affected by the proviso. This should clear up much of the Government's apprehensions as to the effect of the proviso: the fear of "outrageous frauds" and "palpable mistakes" need not be inspired from any reading of the proviso, for in such cases the fraud or mistakes shows that the mind did not operate at all; the proviso is concerned only with cases to annul patents, which presupposes that the patent represented a mind operating and does not affect so-called patents—mere pieces of paper—which are the product of the second classification of fraud—the outrageous frauds, which prevent the mind from operating at all.

Again in answer to the disastrous consequences anticipated, we make three inquiries. First, as the proviso has been in effect for twenty years, what disasters have resulted from the proper protection which it has afforded these lieu land patents? Second, is not such a fear of consequences too great a criticism of inefficiency and incompetency in the Government officers? Even assuming that persons can be found to perpetrate a fraud, is it reasonable to assume that they will be successful with the Government's agents? Third,

are there not also equal dangers of injustices to the patentee by charges of fraud being made in bad faith, or improperly, or as a subterfuge, to recover land justly patented; and, as the patentee has already had its share of mistakes or errors, it would seem that the proviso as to these limited lieu lands is wise, and that, balancing the convenience of the Government and the convenience of the patentee and his proposed purchasers, we need not be unduly alarmed at possible consequences. They have not resulted in the past operation of the proviso; why should they result in the future?

(f) It should be noticed that in cases that come within the proviso the government officers are assumed to have already made one mistake in the disposition of the public domain, and the grantee has already been subject to inconvenience resulting therefrom, and has, after investigation and perhaps prolonged litigation, either in the Land Department or in the courts, lost lands or relinquished lands to the government as a means of correcting the mistake of government officers. In defining its policy in regard to the bringing of suits to annul patents, it is, therefore, quite natural for the government to recognize that the railroad company in the cases mentioned in the proviso has had more than its share of litigation and dispute, and therefore, it has announced as a rule of policy in these cases, which necessarily presuppose that one dispute has already been had and adjusted, that the grantee, after obtaining patent to the lieu lands, shall not be further annoyed by having his title to the lieu lands contested

and litigated just as his title to the lost or relinquished land was contested and litigated. The Government *limits the time* within which *to investigate* and determine the validity of the grantee's *rights to the lieu lands to a period extending from the date of the selection to the date when the patent is issued.* During this period it may investigate to the fullest extent all matters affecting the right to make the selection, including all matters such as are charged in the bill of complaint in this case. But its conclusion in favor of the right to make the selection becomes as to it, in this limited class of cases, by virtue of this proviso, res adjudicata as soon as the patent is issued.

(g) Of course if the judgments of human tribunals were mathematically accurate exceptions could always expressly be made in cases of fraud. *Since, however, judgments of human tribunals are not infallible* and are subject to very grave errors, *and since fraud cannot be mathematically proved or disproved,* and is the most difficult matter either to prove or disprove, and ingenious suspicions frequently lead to unjust judgments finding that fraud actually existed where none in fact did exist, and since charges of fraud may be oppressively made, *the law,* taking a pratical view of the matter, *is full of instances where,* for reasons of policy, *the question of fraud will not be examined.* Take, for example, statutes of limitations generally, statutes of fraud requiring certain contracts to be in writing, statutes concerning wills, and many other statutes. In such cases the law does not say that fraud, or any other fact, did, or did not, exist, but

declares that policy forbids an inquiry into the subject by fallible human tribunals. In very rare instances injustice may be done, but in the great majority of cases the policy which limits inquiries by human tribunals and recognizes the danger of error is wise and justified by actual practice.

The proviso in this case, forbidding the suit which the Government now seeks to maintain, contains just such a limitation, and, recognizing the possibility of error in all investigations into questions of fraud, the legislative branch has declared that no such investigation shall be conducted in any case after six years after the date of the issuance of the patent, and that, in the case of lands patented in lieu of other lands that were once patented, but were afterwards relinquished by the patentee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry, no suit shall be brought or maintained to annul the patent, whether on the ground of fraud, which is the most common ground, or for any other reason, but that all matters such as are charged in the bill in this case, or any other matters affecting the right to the lieu lands, must be *investigated and determined prior to the issuance of patent,* and that the issuance of the patent shall be a conclusive determination against the truth of the charges now made.

The wisdom of such legislation seems abundantly justified in the present case where it seems unfortunate that the prohibition is not extended to all lieu lands instead of being limited to lieu lands of the character now in question. It was just this kind of situation

where the Government was changing its rulings and acting oppressively that caused the passage of the proviso.

We respectfully submit that no implication can justly be made excepting cases of alleged fraud from the operation of this statute, or of the proviso.

In fact, however, these reasons are more properly presented to a legislative department of the government as a reason why such a law should be passed, but we recognize that they are almost out of place in a discussion as to the meaning of the act in question. The act clearly provides that "no suit" shall be brought for lands of the peculiar character here involved and this cannot be construed to mean that "some suits can be brought."

Moreover, the question (if it ever was a real question) whether cases of fraud were intended to be excepted from the provisions of the act is forever set at rest by the decisions of the Supreme Court, to the effect that cases of fraud were clearly intended to be included.

U. S. vs. Chandler Dunbar Stc. Co., 209 U. S. 447; 28 Sup. Ct. 579 at 580.

U. S. vs. Winona Etc. Ry. Co., 165 U. S. 463; 17 Spp. Ct. 368 at 370 and 371.

E.

THE LIMITATION ACT OF 1896 IS NOT ONLY A STATUTE OF LIMITATIONS BUT LARGELY AN ACT CONFIRMING AND STRENGTHENING GOVERNMENT PATENTS.

The Circuit Court of Appeals held the proviso clearly applicable in this case and the Court properly remarked that, as the language used was clear, there was no necessity for giving any reasons for the legislation, adding, however, that the reasons given by us in this brief lost all their force by reason of the fact that the proviso is found in a separate statute. We were at one time inclined to the view that there was force in this criticism but reflection has since convinced us to the contrary and this reflection is, in fact, caused by the comment of the trial Court that the Act in question is not a mere statute of limitations but a confirmatory act confirming these railroad land patents. This view is strengthened by the history of the legislation to which the Government has referred.

Thus, in connection with the history of this legislation as showing whether it should be narrowed or broadened by construction, it is important to observe that the debates show that the object of Congress was to cut down the power of the Government and to strengthen patents. The point of view of Congress was thus to broaden, and not narrow protection to Government patentees. The proviso, if history is to be resorted to, should be construed in this light.

Thus, in the first place, the legislation came before Congress with a strong recommendation from the President that there should be no limitation at all on the rights of the Government, and that existing limitations should be repealed. Notwithstanding the strong recommendation of the Executive Department, this idea was completely repudiated by Congress.

Next, we observe the legislation, as originally reported by the committee, covered all special grants and this was at once objected to on the ground that many special grants deserved special consideration and protection. Accordingly it was proposed to eliminate Mexican grants and one grant after another and finally the Act was cut down to "railroad and wagon-road grants" (p. 176, 1764).

We have called attention to the fact that the bona fide purchases were given absolute protection, and their titles "confirmed."

The absolute protection given lieu lands of this peculiar character is another amendment illustrating the view of Congress that patents should be confirmed rather than attacked.

We have also called attention to the fact that the House bill provided a general ten year limitation and the Senate cut this to six years.

That a fear of suit without merit was regarded as a danger and an expense from which the patentee should be relieved is shown in the following (21905) and similar passages (p. 1937-1938 p. 1764) in the debates:

"Every man's land is clouded with the thought, with the certainty, that the Secretary of the Interior may institute a suit against him. He may be conscious of his ability to defend himself, but he does not want to go to a Federal Court, possibly 100 or more miles away, into a community in which he is a stranger, and there make his defense. He cannot do it without incurring expense."

That it was appreciated that patents needed protection is shown even by the committee's report which favored the Government (p. 1760), and Congress felt that, in the language of the Record, "while it was important that the rights of the Government should be cared for, it was also of the highest importance that the Government patent issued by the highest authority of the nation should be evidence of a final and complete character that the Government's title had been lawfully transferred," It was this idea, hinted at in the committee's report, which gained more and more favor in the legislative body and called forth the proviso.

We think the hostile attitude of Congress and the extraordinary revelations in the debates showing appressive action by the Government's representatives show that, while Congress was desirous of protecting the Government, it also felt that experience showed that greater good would be accomplished by confirming and strengthening patents rather than by allowing the Government to attack them.

First, it was the desire of Congress to give all patents a new life and vigor, to fix a short limitation period generally beyond which the patents generally could not be attacked. This would give a new value to the

patents, just as a clause in an insurance policy against its being contested because of mistakes in warranties after a few years gives a greater value to such policies. Patents generally were in other respects strengthened; in the case of bona fide purchasers, they were actually confirmed.

Coming next to the lieu land patents of this peculiar class, Congress was declaring the attitude which the Government, at the time of the grants, should have taken, and should always take. Congress was merely consumating an implied understanding assumed at the time the lieu land grants were made.

Take for instance, the situation of the Manitoba Company at the time of its grant. Manifestly the railway company, sustained by the opinion of the Supreme Court of the United States, could have refused to accomodate the government and could have retained its unassailable title to the Dakota lands. We must, therefore, indulge the assumption that the government would have cheerfully agreed to have tempted the railway company by assurances, in advance, that the railway company's title to lands accepted for the Govenrment's convenience should be as unassailable as the title to those surrendered, and should thereby be made as equal in quality as they were made equal in quantity to the lands surrendered. The Court will hardly be able to conclude that the railway company would have accepted the terms of the proposed exchange if the government had expressly declared that the invited exchange of lands should involve perpetual litigation for the railway company as to each tract to

be selected. Such a theory as to the probaole policy of the government involves an injustice on the part of the government of little less merit, if any than the alleged fraudulent conduct so loosely charged in complainant's bill against the corporation which saved the Government more trouble and expense than could be measured in the money value of the lands promised to be given in exchange. The policy on the part of the Government which its representatives now contend for would have been little less than a fraudulent one, and we respectfully insist that there is no language in this statute which will justify the court in finding or declaring a carefully concealed purpose on the part of Congress to obtain from the railway company its cooperative effort to relieve the situation in Dakota and give in exchange nothing more substantial than the right in the railway company to repeat its Dakota experience in the form of endless litigation with the Government which it was seeking to accommodate. We think, therefore, that*the Government* either *intended,* as shown by this law, *to make its patents for the exchange lands* unassailable as to all such lieu lands of the character here involved, or as to none, and that the proviso cannot be, by a forced construction, nullified only in part, but, if nullified at all, must be entirely nullified and that the *act of* 1896 *was plainly passed for the purpose of consumating in good faith those conditions of the previous adjustment which any fair minded citizen,* similarly situated, *would have considered impliedly involved in an exchange of such land.*

By way of illustrating the confirmatory nature of

this legislation, assume that the question of the alleged mineral character of this land had been contested before the Land Department by the Railway Company and the Government had held the land non-mineral and had issued the patent. It is well settled that such a finding is res adjudicata and that the patent partakes of the nature of a judgment in the contest and the Government could not again be heard to litigate the question. This is the rule where there has been a contest.

U. S. v. Whitted, 245 Fed (C. C. A.) 629.

U. S. v. Throckmorton, 98 U. S. 61; 25 L. Ed. 93.

Now this proviso, as regards these lieu lands, simply gives the same effect to these patents, whether or not there is a contest by the Government and a hearing in Land Departmnt, as would result if there had actually been a hearing. *The proviso says,* in effect, that all investigations must be made and hearing had prior to the patent and, *if the Government makes no investigation, or holds no hearing, if it allows the serious allegations in the selection proceedings that the lands sought are of the character specified in the grant, to go by default, then the patent shall, as regards these lieu lands, be treated as a default judgment* confirming the rights of the patentee just as effectively as if a contest and hearing had been had. There is nothing in the least dangerous in such legislation.

As the legislation so largely partook of the nature of confirmatory legislation; as the first two subdivisions of the section alone can be called limitation

provisions, and as the lieu land provision is expressly and clearly only confirmatory legislation, confirming titles acquired or to be acquired under these peculiar lieu land grants, the proviso is practically an amendment to the lieu land grants giving the grantees preferred rights which they could have secured in the grants themselves if they had been insistent, or at least giving them what was implied at the time, or what a gracious soverign Government reviewing the acts of its officers, felt should later be given, practically in recognition of rights assumed always to have existed in favor of the grantees.

In this view, manifestly it is immaterial when the confirmatory (we could properly say, amendatory) act was passed or that the proviso is found in an act separate from the grant. This was necessary merely because no one had ever anticipated before the extraordinary, even oppressive, activity of the Government officers until they were revealed in these debates in Congress.

The matters here in dispute have been passed upon by five judges, two in the trial Court and three in the appellate Court. It is respectfully submitted that the fears of the Government as to the dangers of enforcing this legislation are idle and the decree should be affirmed.

We respectfully submit that Congress, recognizing the abundant merit of the claims of the Manitoba Company upon the Government, has enacted a wise and moral piece of legislation when it has declared that all inquiries as to the validity of the title to be conveyed

in return for the relinquishment of lands relinquished to cure the Government's mistakes shall be prosecuted before the issuance of patent, and that after patent the title to the lieu lands shall be at least as unassailable as the title to the lands which were relinquished and that "no suit shall be brought" to annul the patents to lieu lands of the favored class which are here involved. We respectfully submit that no reason has been advanced why this express declaration of Congress should not be obeyed and that, on the contrary, good faith, fair dealing, wisdom and morality all demand that this direction of the legislative branch should be given full force and not needlessly and effectually nullified.

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December, 1917

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APPENDIX

In this appendix we set forth in greater detail, accompanied by quotations from the record, the conclusions we have drawn in the brief as to what the history of the legislation through Congress shows. We classify this under three heads.

(1.)

The Bill Was Passed in Haste, Hence the Limited Debate Does Not Show Adequately the Views or Intentions of Congress.

On each of the few occasions when the bill came up for consideration the Congressional Record shows great care and deliberation in the committees but haste in the consideration of the bill by the entire legislative body. The committee reported the Bill so as to get the report printed and before the individual members of the House, as it was realized that the matter would have to be left to the individual judgment of the members from the Bill itself without much enlightenment from the debate (P. 1294). On the first debate on the Bill, when the report of the committee was finally presented (Pp. 1760 to 1766), an opponent of the Government's policy of bringing these suits objected to its being given any special privilege, remarking (P 1763): "This is a Bill which I am inclined to think will provoke a good deal of discussion." Reply was made that there was an existing statute of limitations (the Act of 1891) outstanding and that under this

statute, as regards past patents, the time within which the Government could bring suit would expire on March 3, 1896, which was but two weeks distant, and hence prompt action should be taken, if the Government's rights were to be recognized at all as regards past patents (P. 1763), by extending the limitation period as to such patents for ten years more. The haste shown in the Senate and the emphasis placed upon prompt action will be covered later. When the Bill came back to the House with the Senate's amendments, it was suggested that there should be a conference report and it was urged, as finally prevailed (P. 2171) that the Senate amendments should be concurred in; and it was said: "This Bill must pass now substantially if at all, because the limitation will expire next Monday, and if we go into a conference the chances are that this Bill may be defeated," and hence no conference committee was appointed and the Bill went through, notwithstanding the fact that one member urged (P. 2171) that the members apparently wanted "to rush it through in hot haste," and exclaimed "I do not believe this Bill should be rushed through."

It seems to us that on such a record it is impossible to contend that the history of the Bill in congress can be resorted to for the purpose of ascertaining the meaning clearly conveyed by the prohibitory mandate of the proviso in question.

III.

(2.)

The Bill Was Not Debated at All in the Senate.

The entire history of this Bill in the Senate, as far as any discussion of its merits is concerned, is found on page 2067. Not a word is found there in any way explanatory of any provision of the Bill that we are now interested in. The remarks are limited practically to a consideration of the necessity of immediate action and to a statement that the bill was carefully examined in committee and unanimously approved and that the Senate should accept the judgment of this committee in the light of the necessity of prompt action. Thus the Senate was assured that all phases of the entire subject had been gone over carefully by the committee, with every member of the committee except one present, and the committee had unanimously approved the bill, with the exception that the limitation period of ten years fixed by the House had been cut down by the committee to six years, and another slight change had been made.

The amendment reducing the time from ten to six years was an amendment to the very portion of the statute we now have under consideration, to wit, Section 1. This portion of the statute as so proposed to be amended (including the proviso here in question) was then read to the Senate and agreed to in the form it had come from the House, except that the period of limitation was cut down from ten years to six years, and unanimous consent "owing to the emergency" was asked for a consideration of the Bill and for placing it on its final passage in the Senate.

Senator Hoar, with characteristic independence of thought and indifference to criticism, did not hesitate to make an enquiry as to whether in one particular the Bill provided adequate protection to the railroad companies as patentees in certain cases.

No discussion of any moment was revealed in the Senate enlightening us on the meaning of the law.

Under these circumstances, as the record in the upper branch of congress is so meager, and as this meager record shows that there also a voice was raised emphasizing the necessity of being just to the railroads as patentees, and as no discussion was indulged in as regards any detail of the Bill except the part of the Bill where the proviso here in question is found, and as this part of the Bill including the proviso was read and part amended leaving the proviso intact as read to the Senate, the conclusion is inevitable that the able lawyers of that body, on the committee and off of the committee, understood the import of the proviso, knew that it meant just what it said, and approved the justice and morality of its terms in absolutely prohibiting suits to annul lieu land patents of the limited character referred to, that is to say, lieu land patents issued to correct mistakes of Government officers; that is to say, lieu land patents conveying title to other lands in return for unassailable titles to other lands which the railroad companies had given up to relieve the Government from embarrassment. Undoubtedly the Senate appreciated the morality of the clear mandate that where a railroad company had secured an unassailable title to land and was asked to give up that

title so as to relieve the Government from embarrassment by reason of its own failures, the title to be received in return, represented by the lieu land patent, should be a title to an equal quantity of land and to an estate of equal quality; that is to say, the title to the lieu land received should be equal in quantity and quality to the land given up; an unassailable title having been given up, an unassailable title should be received; and the patentee of the lost or relinquished lands, having already suffered inconvenience and expense and uncertainties because of Government mistakes should receive a lieu land patent constituting a muniment of title of the highest import free from any danger of further attack, inconvenience, expense or uncertainty.

(3.)

In the Debate in the House Express Attention Was Called to the Necessity of Protecting the Railroads as Patentees of These Limited Lieu Land Patents.

While it is freely confessed that most of the debate exhibited solicitude for purchasers in good faith from the railroads, nevertheless in the midst of the old-fashioned, rash, thoughtless accusations of "railroad" interest, the silence of the many is not to be construed as a declaration by them that they did not see the merit and the strong equity in the position of the railroads making or taking lieu land selections because of, or to cure the mistakes of, the Government's of-

ficers. Thus the unfortunate position in which a railroad company might find itself which had already lost lands because of mistakes or which had even come to the rescue of the Government in the past is shown just appearing in the debate on purchasers in good faith, but nevertheless the equity of the railroad companies' position appears with sufficient clearness to show that the ancient "railroad" cry could not altogether down the apparent justice and equity of the right of the railroad to even preferred attention in preference to all others in the matter of lieu land patents of this peculiar type. The equities of the railroad companies in lieu land patents of this limited type were treated with the equities of purchasers for value of all lands. Thus notice the following passage on page 1905.

> "The cases do not arise even from any mistake of fact. There is no mistake of fact nor fraud involved in these. They grow out of the changes of construction by the officers today differing from those of the officers of twenty, thirty or forty years ago, * * * The Department has recently changed that ruling. * * *
>
> "Although these lands were long ago certified to the company, although they have sold them, *now they require the company to reconvey the lands conveyed to them long ago,* which requires the holder of those lands to show that at present he is a bona fide holder. * * * I do not believe that there is any justice in that."

Again, note the following criticism (P. 1906) in reference to the injustice which it was feared the Government's representatives would inflict, even when

the railroad had acquiesced in the Government's view to its own prejudice:

> "In another instance that I am familiar with, Mr. Speaker, in your own State there was a grant to a company when, practically by an error or an oversight on the part of the officers of the United States, the lands lying on the line on either side of the file plat of the road were not withdrawn from market for a considerable period. Settlers came in and took these lands. Later, when the railroad was constructed, it was found that there was not within the limits of the grant a sufficient quantity to meet the purposes of the grant. The Department held that lieu lands might be given—lands in another locality—*and the company was compelled to go away beyond its grant to lands that did not have the benefit of the construction of this road,* and take 201,000 acres, and one block of 10,000 acres of it they sold for $2500,00—25 cents on acre—but they took these lands under the then ruling of the Department.
>
> "Under the advice of the law officers of the Department, subsequently the Department changed its view. * * * * Then they changed the ruling and held that lands must be taken within the prescribed limits or else the entries and selections were void. *Now one of the suits ordered is to recover the title of these lands taken in lieu of those that the company lost through the failure of the federal officers to withdraw the lands from the market.*
>
> *"I am not prepared to say that successful contests might not have been made, but they elected to take the other course and leave the settlers in quiet occupation."*

Another illustration may be given showing that, as regards this proviso, it was appreciated that these limited lieu lands should be given preferred protection (P. 1938):

"Mr. Speaker, the pending amendment affects the title to about 201,000 acres of lieu lands in the State of Nebraska. * * * About 201,000 acres of land were *accepted by a certain grantee in lieu of other lands to which that grantee was entitled* in the South Platte country. *The lands accepted* in the North Platts country in the State of Nebraska *were in some instances less valuable* than those in the South Platte country. *Nevertheless the grantee accepted these lieu lands rather than disturb the settlers* who had filed homestead and other entries upon South Platte lands properly included in the grant to which I have referred."

We have alredy called attention to the insistence in the Senate that justice should be done to the railroads.

Lastly, on the return of the Bill to the House for final approval, the advocates of placing no limits upon the oppressive power of over-zealous officers to bring vexatious suits were so disappointed by the reasonable legislation which was finally passed that they expressly pointed out what the consider the iniquity of the new policy of extending protection to purchasers in good faith and the similar iniquity of the policy of doing exact justice to the railroads as regards lieu land patents issued to correct Government errors. Thus the zealous advocates of unlimited power in the Government officers, the advocate of the duty of the Government to harass even purchasers in good faith, upon the final debate on the Bill in the House, exclaimed in agony at the apparent justice of the measure in its final form, and raised the old "railroad" cry in his efforts to defeat this legislation, pointing out the very views which we are advocating here, but, as he made no progress in his cry that the new policy was wrong

in providing protection for purchasers in good faith, so also he made no progress in his bitter denunciation of this law because it afforded the railroads, in the matter of these peculiar lieu land patents, the moral protection to which they were entitled. We quote the following, which is conclusive that the very matters that we are now considering here were presented to the House (P. 2170):

> "If this Bill becomes a law, it introduces into the Department and into the courts an entirely new proposition for consideration in adjusting and dealing with these land grants. By the Act of March 3, 1891, congress was content with a statutory limitation and trusted that Act to give the purchasers all the rights that were granted them not in conflict with settlers, but here is a proposition to limit the right of investigation to two kinds of grants, and, while it pretends to do this, at the same time it in effect proceeds to confirm them, for it provides that 'no patent to any lands held by a bona fide purchaser shall be affected or annulled, but the right and title to such purchaser is hereby confirmed.' This Bill I say, Mr. Speaker, would introduce a new subject of enquiry for the Department—that of investigating the claims of all persons who claimed to be bona fide purchasers. * * *
>
> *"Perfect and complete immunity is given the railroads against suits for frauds and errors in patents for lieu lands by the proviso to the first section of the Bill, and this is substantially all they want and all they ask.* For my own part I do not believe there ought to be any limitation against the Government. * * * * You had better throw off all disguise and say to the railroads 'Take the grants, sell the lands, get what you can for them, without fear of investigation.' That is what you have done indirectly * * * * and the Bill is in the interest of the railroads and not the settlers."

Notwithstanding this old-fashioned denunciation of the railroads, it was seen that the mere word "railroad" was sufficient to make this advocate oppose the law, and hence the mere fact that persons were innocent purchasers from a railroad was sufficient in his judgment to take away any innocence in even the innocent purchaser. No wonder his views did not prevail. But we cite the above passage so that it will be seen how bitter was the debate and how the justice and morality of the position of the bona fide purchaser of any lands and of the railroad in receiving lieu lands to make up for Government mistakes were appreciated. Notwithstanding the "railroad" cry, it was appreciated that the fact that an innocent purchaser had purchased from a railroad did not make his purchase any less innocent, and it was appreciated simultaneously that where a railroad had already suffered enough by reason of mistakes of Government officers, and had even come to the rescue of those officers, it ought not to be required to do further and to be further subjected to vexatious and oppressive suits. Having given up a perfect title to other lands, it should receive in return, in the form of its lieu land grant, something more than a privilege of being sued; it should receive a right to select an equal quantity of other lands which, when selected and patented, should be equal in estate to the other lands, and, though the Government might make any inquiry it wished prior to the issuance of patent, the issuance of the patent should be conclusive evidence that the Government had parted with its title, and the title thereby transferred to the railroad company should be as unassailable as that which it had surrendered.

UNITED STATES *v.* ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 75. Argued January 15, 16, 1918.—Decided June 3, 1918.

The Act of March 2, 1896, c. 39, 29 Stat. 42, limiting the time within which suits may be brought to vacate land patents, contains a proviso "that no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry." *Held*, that the proviso was a curative measure referring only to lands patented before the enactment and was no protection for a patent procured afterwards by fraud.

The general principle underlying the strict construction of statutes of limitation as applied to the Government, viz., that the public interest should not be prejudiced by negligence or default of public officials, applies with peculiar force in the construction of a provision which operates to bar absolutely the recovery of the value of land as well as the land itself, in favor of the immediate recipient of a fraudulent patent no less than a *bona fide* purchaser.

In the present case, resort to this principle and to the legislative history of the proviso, added to its apparent independence and the extraordinary and unreasonable effects of applying it to future cases, overweigh the general rule of prospective construction and the fact of immediate association with prospective provisions.

The equity of a statute barring equitable relief for fraud and mistake is on the side of a strict construction.

The remarks of the chairman of a congressional committee, referring to matters of common knowledge in explanation of an amendment offered by him to a bill which he has previously reported, may be considered as throwing light upon the subject-matter of the amendment, for the purpose of solving an ambiguity.

225 Fed. Rep. 27, reversed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Kearful for the United States.

Mr. I. Parker Veazey, Jr., with whom *Mr. E. C. Lindley* was on the brief, for appellees.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was a suit by the United States to annul a patent issued June 24, 1907, to the St. Paul, Minneapolis & Manitoba Railway Company (referred to below as the Manitoba Company), for certain lands in the State of Montana, upon the ground of fraud and mistake—fraud on the part of the agents of the company in representing that the land was non-mineral in character, and mistake on the part of the officers of the Land Department in failing to notify the register and receiver of the local land office that the lands had been classified as mineral and the classification sustained by the Secretary of the Interior under the Act of February 26, 1895, c. 131, 28 Stat. 683. The District Court granted a motion to dismiss the bill upon the ground that the suit was barred by the proviso of § 1 of the Act of March 2, 1896, c. 39, 29 Stat. 42; and its decision was affirmed by the Circuit Court of Appeals, 225 Fed. Rep. 27.

It appears that by Act of March 3, 1857, c. 99, 11 Stat. 195, certain public lands were granted to the Territory of Minnesota for the purpose of aiding in the construction of railroads, and the Manitoba Company afterwards succeeded to the rights and privileges of the Territory under the granting act. At the time of the grant the Missouri River formed the western boundary of the Territory; but in the following year the State of Minnesota was admitted into the Union, with its western boundary fixed on a line some distance east of that river (Act of May 11, 1858, c. 31, 11 Stat. 285); the excluded land being

left to become a part of the Territory of Dakota (Act of March 2, 1861, c. 86, 12 Stat. 239), afterwards admitted as the States of North Dakota and South Dakota. After the admission of Minnesota, the Land Department, in the administration of the land grant, rejected the claim of the Manitoba Company to lands within the limits of the grant but without the limits of that State, and recognized the rights of settlers and purchasers to Dakota lands within the limits of the grant. In *St. Paul, Minneapolis & Manitoba Ry. Co.* v. *Phelps* (1890), 137 U. S. 528, this court set aside the departmental construction and sustained the company's claim to the Dakota lands. To obviate the resulting hardships to settlers and patentees, Congress passed an Act of August 5, 1892, c. 382, 27 Stat. 390, providing that the Secretary of the Interior should cause to be prepared and delivered to the Manitoba Company a list of the lands claimed by purchasers or occupants, and that the company should be permitted to select in lieu of these "an equal quantity of non mineral public lands, so classified as non mineral at the time of actual Government survey . . . not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection lying within any State into or through which the railway owned by said railway company runs, to the extent of the lands so relinquished and released." The Montana lands here in question were selected by the company in March, 1906, and patented to it in June, 1907, in lieu of Dakota lands relinquished by the company pursuant to its acceptance of the Act of 1892.

There is no question but that the bill of complaint sets forth sufficient grounds of fraud and mistake to warrant the annulment of the patent, were it not for the bar set up under the Act of March 2, 1896; and whether that bar applies is the sole matter presented for decision upon this appeal.

The act is entitled: "An Act to provide for the extension of the time within which suits may be brought to vacate and annul land patents, and for other purposes," and its first section reads as follows: "*Be it Enacted* . . . That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this Act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress and amendments thereto[1] is extended accordingly as to the patents herein referred to. But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed: *Provided*, That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry."

Laying aside other questions raised by the Government, we have reached the conclusion that, having regard to the general principle which requires a strict construction to be given to legislation in derogation of the public right, and in view of the legislative history of this particular enactment, the proviso must be given the effect of a curative measure confined to lands theretofore patented, and not granting dispensation for frauds or mistakes thereafter occurring.

It will be observed that the proviso is not a mere statute of limitation, but an absolute bar of suits by the United

[1] Act of March 3, 1891, c. 561, as amended by Act of the same date, c. 559 (26 Stat. 1099, 1093).

States; not merely of suits to vacate and annul patents, but of suits to recover either the land or the value thereof; not merely in favor of *bona fide* purchasers, but also of the immediate recipient of an unlawful certification or patent. The general principle of public policy applicable to all governments, that the public interest should not be prejudiced by the negligence or default of public officers, which underlies the rule of strict construction for statutes of limitation, applies with peculiar force to a statute of this character. *United States* v. *Knight*, 14 Pet. 301, 315; *Gibson* v. *Chouteau*, 13 Wall. 92, 99; *United States* v. *Thompson*, 98 U. S. 486, 489; *Fink* v. *O'Neil*, 106 U. S. 272, 281; *United States* v. *Nashville, Chattanooga & St. Louis Ry. Co.*, 118 U. S. 120, 125; *United States* v. *Whited & Wheless*, 246 U. S. 552.

If the language of the proviso stood alone: "That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry," it hardly would be questioned that the rule of strict construction would confine its effect to past cases presumably known to the lawmaker. Aside from a nice grammatical criticism based upon the use of the imperfect tense, full effect can be given to its language by treating it as a validation of the title of lieu lands theretofore certified or patented under the conditions mentioned. The very particular specification of the circumstances under which it was to apply, with resulting narrowness of its scope, tends to negative the inference that it was designed to lay down a general policy for the future. It conveys rather the impression of a curative measure, upon which the general presumption that legislation is intended to operate prospectively and not retrospectively can have little if any bearing.

It is said that this view is untenable because in the former part of the section specific reference is made to patents "*heretofore* erroneously issued" and to "patents *hereafter* issued," and if Congress had intended to limit the proviso to lands certified or patented before the passage of the act it would have used appropriate and specific language for the purpose. The suggestion has weight, but we cannot regard it as determinative, in view of opposing considerations. Looking at the section as a whole, it will be seen that the proviso expresses a thought so different from what precedes, that it seems almost like a separate provision, inserted here for convenience, and without much regard for structural conformity with the context.

This impression is confirmed when we review the legislative history of the measure.

By an Act of March 3, 1887, c. 376, 24 Stat. 556, Congress had directed the Secretary of the Interior immediately to adjust, in accordance with the decisions of this court, railroad land grants theretofore unadjusted, with the object of restoring to the United States the title to lands erroneously certified or patented under such grants, saving the entries of *bona fide* settlers erroneously canceled on account of a railroad grant and the rights of *bona fide* purchasers from the grantee company of lands erroneously patented. The work of adjustment proved to be one of great magnitude, and it had not been completed at the time when the act under consideration was passed. Meanwhile the Acts of March 3, 1891 (c. 561, § 8, 26 Stat. 1095, 1099; c. 559, 26 Stat. 1093), had provided that suits by the United States to vacate and annul any patent theretofore issued should only be brought within five years thereafter (that is, within five years after March 3, 1891). Not long before the end of the period thus fixed, beyond which lands could not be recovered even if the investigation in progress under the 1887 Act should

disclose that they had been erroneously certified or patented, the President transmitted to Congress a special message, under date January 17, 1896 (House Doc. No. 151, 54th Cong., 1st sess.), explaining the situation and recommending that the Act of 1891 should be so amended as not to apply to suits brought to recover title to lands certified or patented on account of railroad or other grants. This was referred to the Committee on Public Lands of the House of Representatives, and that committee, not acceding to the particular recommendation of the message, reported a bill intended to give five years' additional time for bringing to a conclusion the pending investigation and adjustment, but providing that as to *bona fide* purchasers even this extension should not apply (Report No. 253, House of Representatives, 54th Cong., 1st sess.; 28 Cong. Rec. Pt. 2, p. 1761). The first section of the bill as reported, with which alone we are concerned, is given verbatim in the margin.[1] As will be observed, it contained nothing corresponding to what is now the proviso.

The proviso was inserted, upon the motion of Mr. Lacey, chairman of the committee and in charge of the bill, while it was under consideration in the House, for the plainly declared purpose of providing for a specific case referred to in the debate as having arisen in the State of Nebraska, where lieu lands to the extent of more than 200,000 acres had been certified or patented to a railroad company to make good the loss of an equal acreage of lands within the limits of the grant due to an erroneous

[1] "Be it enacted," etc., "That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a special grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within ten years after the date of the issuance of such patents. But no patent to any lands held by a *bona fide* purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed."

ruling of the Land Department resulting in a failure to withdraw the granted lands from entry; and upon the ground that the lieu land locations were without warrant in law, suit had been brought, and was then pending, to cancel the patents.[1]

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[1] (From 28 Cong. Rec., Pt. 2, p. 1906.)

"Mr. Hepburn: . . . In another instance that I am familiar with, Mr. Speaker, in your own State [Mr. Mercer in the chair], there was a grant to a company when practically, by an error or an oversight on the part of the officers of the United States, the lands lying on the line on either side of the file plat of the road were not withdrawn from market for a considerable period. Settlers came in and took these lands. Later, when the railroad was constructed, it was found that there was not within the limits of the grant a sufficient quantity to meet the purposes of the grant. The Department held that lieu lands might be given—lands in another locality—and the company was compelled to go away beyond its grant to lands that did not have the benefit of the construction of this road and take 201,000 acres, and one block of 10,000 acres of it they sold for $2,500—25 cents an acre; but they took these lands under the then ruling of the Department. Under the advice of the law officers of the Department, subsequently the Department changed its view. . . . Then they changed the ruling and held that lands must be taken within the prescribed limits or else the entries and selections were void. Now, one of the suits ordered is to recover the title of these lands taken in lieu of those that the company lost through the failure of the federal officers to withdraw the lands from market. . . .

"Mr. Lacey: As to the instance that my colleague cites as having occurred in Nebraska, I propose at the proper time to offer an amendment which I think will cover the points he has in mind. I will send the amendment to the Clerk's desk to be read as a part of my remarks, so that it may appear in the Record for the information of members.

"The amendment was read, as follows:

"Add at the end of section 1: '*Provided*, that no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry.'"

On the following legislative day (p. 1937), the amendment was offered by Mr. Lacey, accompanied with this explanation: "My

It is not our purpose to relax the rule that debates in Congress are not appropriate or even reliable guides to the meaning of the language of an enactment. *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 318. But the reports of a committee, including the bill as introduced, changes made in the frame of the bill in the course of its passage, and statements made by the committee chairman in charge of it, stand upon a different footing, and may be resorted to under proper qualifications. *Blake* v. *National Banks*, 23 Wall. 307, 317; *Holy Trinity Church* v. *United States*, 143 U. S. 457, 464; *Dunlap* v. *United States*, 173 U. S. 65, 75; *Binns* v. *United States*, 194 U. S. 486, 495; *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 20; *Pennsylvania R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, 198; *Five Per Cent. Discount Cases*, 243 U. S. 97, 107. The remarks of Mr. Lacey, and the amendment offered by him, in response to an objection urged by another member during the debate, were in the nature of a supplementary report of the committee; and as they related to matters of common knowledge they may very properly be taken into consideration as throwing light upon the meaning of the proviso; not for the purpose of construing it contrary to its plain terms, but in order to remove any ambiguity by pointing out the subject-matter of the amendment. This is but an application of the doctrine of the old law, the mischief, and the remedy.

The case of the Nebraska lands, mentioned in the debate, is easily identified from public sources of infor-

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colleague [Mr. Hepburn] on yesterday explained that in Nebraska and in some other localities 'lieu lands' had been patented in place of lands that the railroad companies had lost by reason of mistake in the Department in allowing settlement upon those lands. The amendment that I offer confirms the title to those lands that have been thus patented to railroad companies where they have lost other lands by reason of mistake committed in the Department."

The amendment was agreed to (p. 1938).

mation. By Act of July 2, 1864, c. 216, § 19, 13 Stat. 356, 364, the Burlington & Missouri River Railroad Company was granted ten alternate sections per mile on each side of its road in that State. Owing to the failure of the Land Department to take the proper steps about withdrawing the land from the entry, large quantities of the granted lands south of the line were taken up by settlers, and in lieu of this the company was permitted by the Department to take excess lands on the north side of the line to the amount of over 200,000 acres. In *United States* v. *Burlington & Missouri River R. R. Co.* (1878), 98 U. S. 334, this court held that the grant was not limited to lands situate within twenty miles of the road, nor confined to the land opposite to each twenty-mile section of the line, as the Department had held; the court saying (p. 340): "If, as in the present case, by its [the Department's] neglect for years to withdraw from sale land beyond twenty miles from the road, the land opposite to any section of the road has been taken up by others and patented to them, there can be no just objection to allowing the grant to the company to be satisfied by land situated elsewhere along the general line of the road." At the same time the court held (p. 342): "The Act of Congress contemplates that one-half of the land granted should be taken on each side of the road; and the department could not enlarge the quantity on one side to make up a deficiency on the other." However, because the bill as drawn did not identify that part of the land as to which the company's patents were invalid, the decree of the circuit court in favor of the company was affirmed. Soon after the passage of the Act of March 3, 1887, an adjustment was directed for the purpose of distinguishing the tracts erroneously patented to the company on the north side in excess of the amount to which it was entitled on that side, the excess being 200,364.70 acres, and procuring a relinquishment by the company or a cancellation of the pat-

ents in accordance with the Act of 1887. *Burlington & Missouri River R. R. Co.*, 6 L. D. 589; *Chapman* v. *Burlington & Missouri River R. R. Co.*, 20 L. D. 496. It appears that a suit to carry out the adjustment by vacating the erroneous patents was pending at the time of the passage of the Act of 1896. The language of the proviso was aptly chosen to bar such a suit.

But it is said that there is no reason for confining the policy of the proviso to past patents; that if it is only fair, honest, and just that lands patented in lieu of others lost or relinquished by the grantee in consequence of some failure on the part of the Government or its officers should be held by indefeasible title, the same policy would with equal reason apply to future patents. In short, the appeal is to the equity of the statute. But equity implies equality; equal fairness and honesty on both sides. If the prospective interpretation of the proviso could be confined to future patents obtained without fraud or mistake, there would be force in the argument; but suits for the annulment of patents based upon fraud or mistake are the very ones that are proposed to be barred; and in such circumstances no appeal to the equity of the statute can carry us beyond what is clearly expressed in the language of the lawmaker; equitable considerations lie on the side of a strict construction of a statutory provision that proposes to bar an equitable remedy.

And we deem the prospective interpretation as unreasonable as it is inequitable. It was one thing for Congress to pass an act to prevent further prosecution of a suit or suits to annul patents that already had been made, unlawfully indeed, but for the purpose of making good the consequences of previous mistakes by the Land Department. Thus far it could act in the reasonable belief that it knew the extent and consequences of the immunity it was granting. But to say that where lieu lands were thereafter certified or patented in place of

lands lost or relinquished by the grantee no suit should be maintained nor recovery had either for the lands or their value, no matter through what fraud or mistake they might be acquired, would be an entirely different matter, and would offer a premium for future wrongdoing, the extent of which could not easily be foreseen. We cannot attribute such a purpose to Congress without plainer language than is contained in this act.

For the reasons stated, we hold that the proviso is not a bar to the present suit, brought to annul a patent applied for and issued long after its enactment; and the decree under review is

Reversed, and the cause remanded to the District Court for further proceedings in conformity with this opinion.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.